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Judicial Self-Government in Europe

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Articles

Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe

By David Kosař[*]

Abstract

A few years ago, judicial councils composed primarily of judges were viewed as a panacea for virtually all problems of court administration in Europe. The burgeoning literature on judicial councils has shown that this is not necessarily the case. This article builds on this literature, but it argues that judicial self-governance is much broader phenomenon than judicial councils and may also take different forms. Therefore, it is high time to look beyond judicial councils and to view judicial self-governance as a much more complex network of actors and bodies with different levels of participation of judges. To that end this article conceptualizes judicial self-governance and identifies crucial actors within the judiciary who may engage in judicial governance (such as judicial councils, judicial appointment commissions, promotion committees, court presidents and disciplinary panels). Subsequently, it shows that both the forms, rationales, and effects of judicial self-governance have varied across Europe. Finally, this article argues that it is necessary to take into account the liquid nature of judicial self-governance and its responsiveness to political, social, and cultural changes. Moreover, the rise of judicial self-governance is not necessarily a panacea, as it may lead to political contestation and the creation of new channels of politicization of the judiciary.

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A. Introduction

A decade ago, the state of judicial self-governance in Europe was a subject of discussions among judges within judicial associations and transnational judicial communities,[1] at the Venice Commission,[2] and among a few connoisseurs in academia.[3] The accession of the Central and Eastern European countries to the European Union had been completed, judicial councils had been established, and the future looked bright and shiny. Fast forward to 2018. Judicial self-governance is challenged in several EU Member States, it fills the pages of major newspapers,[4] and virtually every supranational organization has a project or two on this topic.[5] Even both European supranational courts have become increasingly entangled in this area.[6]

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[1] The Consultative Council of European Judges (*Conseil consultatif de juges européens*, hereinafter also "CCJE") and the European Network for the Councils of the Judiciary (hereinafter also "ENCJ") have been particularly active in this area.

[2] The number of the Venice Commission's Opinions concerning judicial self-governance is so high that I cannot enumerate them here. For a broader understanding of the role of the Venice Commission in this area, see Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*. 63(4) AMERICAN JOURNAL OF COMPARATIVE LAW 963–1008 (2015); and Valentina Volpe, *Drafting Counter-majoritarian Democracy. The Venice Commission's Constitutional Assistance*, 76(4) HEIDELBERG JOURNAL OF INTERNATIONAL LAW 811–843 (2016).

[3] For rare exceptions of scholars who engaged with this topic much earlier, *see* THIERRY S. RENOUX, LES CONSEILS SUPERIEURS DE LA MAGISTRATURE EN EUROPE (1999); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002); and Wim Voermans & Pim Albers, *Councils for the Judiciary in EU Countries*, EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, CEPEJ (2003).

[4] *See* e.g. Christian Davis, *Polish MPs pass judicial bills amid accusations of threat to democracy*, THE GUARDIAN (Dec 8, 2017), https://www.theguardian.com/world/2017/dec/08/polish-mps-pass-supreme-court-bill-criticised-as-grave-threat; Patrick Kingsley, *After Viktor Orban's Victory, Hungary's Judges Start to Tumble*, THE NEW YORK TIMES (May 1,2018), https://www.nytimes.com/2018/05/01/world/europe/hungary-viktor-orban-judges.html;; James Shotter & Evon Huber, *Poland's top court steps up its challenge to judges being 'purged'*, FINANCIAL TIMES (Aug 2, 2018), https://www.ft.com/content/7965ad18-9658-11e8-b67b-b8205561c3fe; and Benjamin Novak & Patrick Kingsley, *Hungary Creates New Court System, Cementing Leader's Control of Judiciary*, THE NEW YORK TIMES (Dec 12, 2018), https://www.nytimes.com/2018/12/12/world/europe/hungary-courts.html.

[5] *See* e.g. the projects of the Organization for the Security and Cooperation in Europe (https://jobs.osce.org/vacancies/expert-judicial-self-governance-vnodic00667), the European Committee on Legal Co-operation(https://www.coe.int/en/web/cdcj/co-operation-projects/judicial-self-governance-training-azerbaijan); and the International Commission of Jurists (https://www.icj.org/new-icj-report-analyses-the-transition-to-judicial-self-governance-in-serbia/). *See* also projects of the CCJE and ENCJ.

[6] *See* Başak Çalı & Stewart Cunningham, *Judicial Self Government and the sui generis case of the European Court of Human Rights*, in this issue; and Christoph Krenn, *Governing the European Court of Justice: Self-governance as a Model for Success*, in this issue.

In fact, the last two years have been particularly eventful. Law and Justice, the ruling party in Poland, announced and implemented controversial reforms of the Polish Supreme Court and the National Council of the Judiciary.[7] The Court of Justice stepped boldly into the debate in the "Portuguese Judges" case (*Associação Sindical dos Juízes Portugueses*), when it held for the first time that domestic judicial design is within its purview.[8] Soon after the "Portuguese Judges" case, the Court of Justice engaged with the abovementioned Polish judicial reforms – it decided the *Celmer* case[9] and ordered Poland to suspend the application of the provisions relating to the lowering of the retirement age for Supreme Court judges.[10] The ECtHR did not lag behind. While it has engaged with domestic judicial design for much longer[11] than the CJEU, its two recent Grand Chamber judgments in *Denisov v. Ukraine*[12] and *Ramos Nunes de Carvalho e Sá v Portugal*[13] have raised the stakes to a whole new level.

While most eyes are now watching Poland and the response of both supranational courts to developments therein, judicial reforms have taken place in other jurisdictions too. Romania[14] and Turkey[15] adopted controversial reforms affecting the composition of judicial

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[7] *See* Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, in this issue.

[8] ECJ, 27 February 2018, Case C-64/16 *Associação Sindical dos Juízes Portugueses*. For further details *see* Matteo Bonelli & Monica Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14(3) EUROPEAN CONSTITUTIONAL LAW REVIEW 622–643 (2018).

[9] Case C-216/18 PPU, Reference for a preliminary ruling from the High Court (Ireland) made on 27 March 2018 — Minister for Justice and Equality v LM. For an in-depth discussion of this judgment, *see* a symposium on VefBlog at https://verfassungsblog.de/category/focus/after-celmer-focus/.

[10] Interim Order of the Vice-President of the ECJ in Case C-619/18 R Commission v Poland, 19 October 2018.

[11] *See* David Kosař & Lucas Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 713–760 (2015).

[12] Denisov v Ukraine, EUR. CT. H. R. (Judgment of 25 September 2018, app. no. 76639/11) (concerning the president of the influential Kyiv Administrative Court of Appeal).

[13] Ramos Nunes de Carvalho e Sá v Portugal, EUR. CT. H. R. (Judgment of 6 November 2018, apps. nos. 55391/13, 57728/13 and 74041/13) (concerning the disciplining of a judge of the first instance court, the composition of the Portuguese High Council of the Judiciary, and the powers of the President of the Supreme Court of Portugal).

[14] *See* Venice Commission, *Romania. Preliminary Opinion on Draft Amendments to Law no. 303/2004 on the Statute of Judges and Prosecutors, Law no. 304/2004 on Judicial Organization, and Law no. 317/2004 on the Superior Council for Magistracy*, CDL-PI(2018)007 of 13 July 2018; and Bianca Selejan-Guțan, *Romania: Perils of a "Perfect Euro-Model" of Judicial Council*, in this issue.

councils and other aspects of judicial governance. Viktor Orbán's regime in Hungary witnessed a brief revolt of judges in the National Judicial Council,[16] but it soon recovered and adopted a complete overhaul of the administrative judiciary that cements Viktor Orbán's control of the judiciary.[17] Other reforms are in the pipeline. The *Dáil*, the lower chamber of the Irish parliament, passed the Judicial Appointments Commission Bill in the most dramatic fashion.[18] The coalition agreement between the leaders of the *Lega* and *Movimento Cinque Stelle* parties who will run Italy for its next legislative period also promises reform of the elections for members of the Italian judicial council (*Consiglio Superiore della Magistratura*).[19]

Why is it important to analyze this development so thoroughly? If anything, the recent judicial reforms in Hungary, Poland, and Turkey show that authoritarian and populist political leaders care about the control of judicial self-governance bodies.[20] Therefore, we should care as well. If we want to prevent (or at least slow down) the capture of the judiciary by authoritarian leaders and limit the damage caused by populist regimes, we need to know how judicial self-governance bodies work, why they were established, what effects they have brought about, why they are challenged, and where the potential channels of politicization of the judiciary via these bodies lie.

The fact that the state of judicial (self-)governance is in constant flux in many jurisdictions presents a big challenge for this special issue, but each contribution is well embedded in the broader societal and historical context, and thus this special issue will remain a key reference for quite some time. This article of course cannot do justice to the richness of 19 contributions to this special issue. It merely reflects on some common themes regarding the forms, rationales, and effects of judicial self-governance in Europe. Along the way, it identifies emerging trends and suggests avenues for further research.

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[15] Başak Çalı & Betül Durmuş, *Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey*, in this issue.

[16] *See* Kingsley, *supra* note 4.

[17] *See* Novak & Kingsley, *supra* note 4.

[18] *See* Michael O'Regan, *Judicial appointments Bill passes in Dáil and now goes to Seanad,* THE IRISH TIMES (May 31, 2018), https://www.irishtimes.com/news/politics/oireachtas/judicial-appointments-bill-passes-in-d%C3%A1il-and-now-goes-to-seanad-1.3515540?mode=amp.

[19] Maximilian Steinbeis, *Festa della Repubblica,* VERFASSUNGSBLOG, (Jun 2, 2018), https://verfassungsblog.de/festa-della-repubblica/.

[20] *See* Śledzińska-Simon, *supra* note 7; Çalı & Durmuş, *supra* note 15; and David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 HAGUE JOURNAL ON THE RULE OF LAW 83 (2018).

The argument of this article is three-fold. First, it argues that it is high time to look beyond judicial councils and to study the role of judges in governance of the judiciary holistically. This requires focusing on de facto judicial self-governance, the identification of other actors within the judiciary who may engage in judicial governance (such as judicial appointment commissions, promotion committees, court presidents and disciplinary panels), and broadening the studied spheres of judicial self-governance. Second, it is necessary to take into account the liquid nature of judicial self-governance and its responsiveness to political, social, and cultural changes. Finally, it is crucial to acknowledge that the rise of judicial self-governance is not necessarily a panacea, as it may lead to political contestation and the creation of new channels of politicization of the judiciary.

In order to make sense of these arguments, it is also important to clarify the scope of this special issue. It deliberately adopts a broad definition of judicial self-governance.[21] For the purposes of this special issue, "judicial self-governance body" includes any institution (in which a judge or judges sit) that has some powers regarding court administration and/or judicial careers. More precisely, a "judicial self-governance body" is a body with at least one judge whose primary function, entrenched in a legal norm, is to (a) decide about issues regarding court administration and/or the career of a judge, and/or (b) advise those who decide about such issues. This definition thus includes not only judicial councils, but also court presidents, the Court Service, specialized domestic judicial appointment commissions, as well as the Article 255 TFEU Panel for the selection of Court of Justice judges and the Committee of Ministers (CM) Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR.[22] At the same time, owing to limited space this special issue focuses only on judicial self-governance regarding *ordinary* courts and *ordinary* judges, and leaves aside administrative and special tribunals, specialized constitutional courts,[23] and public prosecutors.[24]

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[21] Note that, on reflection, I simply prefer the term governance to government as the former is better for studying judiciaries beyond the state and signifies a change in the meaning of judicial self-government, referring to *new* processes of governing the judiciary, *changed* conditions of ordered rule, and *new* methods by which society is governed. Due to the limited space, I cannot engage with this conceptual debate here. Importantly, I did not impose this view on the contributors to this special issue (some of them use judicial self-*governance*, while others prefer judicial self-*government* or even use both terms). Please keep this in mind when reading this special issue.

[22] *See* Part C for further details.

[23] I am aware that judicial self-governance at these courts raises different issues and often differs significantly from the judicial self-governance of ordinary courts. But these differences can also be abused, *see* the creation of the new parallel system of specialized administrative courts in Hungary (analyzed by Novak & Kingsley, *supra* note 4).

[24] Even though, as you will see below, especially the Mediterranean jurisdictions consider prosecutors on par with judges and often involve both groups in joint judicial self-governance bodies.

Such a broad definition has several advantages.[25] However, I am also aware that our broad definition of "judicial self-governance body" adopts a particular take on several contested issues. It is for instance clear that our definition treats judicial self-governance as a matter of degree rather than a binary variable. Therefore, for us it is still judicial *self*-governance when judges have parity[26] on judicial self-governance bodies (such as judicial councils) or are even in the minority,[27] when prosecutors sit on judicial self-governance bodies as well,[28] when a lay member or the head of state presides over the judicial self-governance body,[29] when judges themselves do not elect judicial members to the judicial self-governance body and judicial members are thus not truly "representatives" of judges,[30] when judicial self-governance is dominated by court presidents at the expense of rank-and-file judges,[31] and when senior judges (or apex court judges) have the upper hand on the judicial self-governance body and thus this body does not proportionally represent all tiers of the judiciary.

More controversially, even if judges from other jurisdictions sit on the judicial self-governance body, we still treat it as a judicial *self*-governance body. This is the case of the ECtHR and the CJEU because, technically speaking, active CJEU judges do not sit on the Article 255 TFEU Panel. Similarly, the relevant resolution of the Committee of Ministers makes clear that only former international judges can sit on the CM Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR.[32] Hence, one may argue that these two panels are not examples of "judicial *self*-governance". However, there is a fine line between "judicial *self*-governance" and "judicial governance" at the ECtHR and the

[25] *See* Part C.

[26] *See* e.g. judicial councils in the Netherlands and the de iure also in Slovakia.

[27] *See* e.g. judicial councils in Spain and France, and the Judicial Appointments Advisory Board in Ireland.

[28] *See* e.g. judicial councils in Italy, France, and Romania.

[29] *See* e.g. judicial councils in Italy and Turkey.

[30] *See* e.g. judicial councils in Poland and Spain.

[31] This was the case in the Judicial Council of the Slovak Republic between 2003 and 2014 (*see* Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia,* in this issue). *See* also Ireland, where court presidents are the only representatives of the judiciary on the Judicial Appointments Advisory Board (*see* Patrick O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* in this issue).

[32] *See* para. 2 of Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (2010).

CJEU. Both expert panels often include former ECtHR and CJEU judges and other "friends" of these two courts. Moreover, the CJEU's and ECtHR's presidents have a major say in the composition of these two panels. The CJEU President selects the majority of the members of the Article 255 TFEU panel and the ECtHR President selects all the members of the CM Panel. Therefore, we include these two bodies in our analysis as well. Not everyone agrees[33] with this approach, but we at least know on what we disagree.[34]

This article will proceed as follows. Part B situates the special issue in the existing literature, explains its structure, and briefly summarizes individual contributions. Part C maps the common themes that have emerged from the contributions to this special issue and problematizes the forms of judicial self-governance in Europe. Part D analyzes the rationales behind the rise and fall of judicial self-governance in Europe. Part E zeroes in on the effects of judicial self-governance on public confidence in courts, judicial independence and accountability, and on transparency and legitimacy of the judiciary. Part F concludes.

B. Setting the Scene

The power of courts has increased worldwide at an unprecedented pace. At the same time, there has been a parallel rise in judicial self-governance. In Europe, this has happened on both national and supranational levels. On the national level, many European countries have introduced judicial councils either voluntarily (France,[35] Italy,[36] the Netherlands,[37] Portugal,[38] Spain,[39] and Turkey[40]) or under pressure from the European Union and the

[33] Actually, several contributions to this special issue show that domestic understanding of judicial self-governance can be much narrower.

[34] I did not impose this view on the contributors to this special issue nor do I want to do so on the readers.

[35] Antoine Vauchez, *The Ever Protracted Rise of Self-Government in France,* In this issue; Antoine Garapon & Harold Epineuse, *Judicial Independence in France*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 273, 285–286 (Anja Seibert-Fohr ed., 2012).

[36] *See* Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model,* in this issue.

[37] *See* Elaine Mak, *Judicial Self-Government in the Netherlands: Demarcating Autonomy,* in this issue. However, note that the Netherlands cannot be easily squeezed into the judicial council model – it introduced the Council for the Judiciary, but powers concerning appointing, promoting and disciplining judges do not lie with the Council for the Judiciary, but sometimes with the government, sometimes with the judiciary authorities, and sometimes they are shared.

[38] Ramos Nunes de Carvalho e Sá v Portugal, *supra* note 13; and especially concurring opinion of Judge Pinto de Albuquerque therein.

[39] *See* Aida Torres Pérez, *Judicial self-government and judicial independence: the political capture of the General Council of the Judiciary in Spain*, in this issue.

Council of Europe during the accession process (all post-communist states in Central and Eastern Europe[41] except for Czechia[42]). Other countries have opted for the Court Service systems, often combined with a special body for judicial appointments (Denmark, Ireland,[43] and Scotland). Even in the countries where political branches still have the major say (Austria, Czechia,[44] and Germany[45]), the power of judges in judicial governance has increased gradually. On the supranational level, the expert element was also introduced, namely the Article 255 TFEU Panel for appointments to the Court of Justice of the European Union (hereinafter the "CJEU")[46] and the Committee of Ministers Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (hereinafter the "ECtHR").[47]

While the unprecedented rise of the decision-making power of courts has been exhaustively addressed in the literature, the increasing power of judges in selecting their peers and in court administration more generally has attracted far less attention so far. This is so despite the fact that the rise of judicial councils and other judicial self-governance bodies is difficult to overlook. The huge policy implications of this phenomenon are also beyond doubt, as evidenced by a plethora of European policymaking bodies involved in this area - not only the European Network of Councils for the Judiciary and the Consultative Council of European Judges, but the Venice Commission and the European Commission have also issued numerous guidelines and developed good practices regarding judicial councils.[48]

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[40] Çalı & Durmuş, *supra* note 15.

[41] *See* Selejan-Guțan, *supra* note 14; Matej Avbelj, *Contextual Analysis of Judicial Governance in Slovenia,* in this issue; Śledzińska-Simon, *supra* note 7; and Spáč, Šipulová & Urbániková, *supra* note 31.

[42] For explanation why Czechia is a "black sheep", *see* Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?,* in this issue.

[43] O'Brien, *supra* note 31.

[44] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[45] *See* Fabian Wittreck, *German Judicial Self-Government: Institutions and constraints of self-government in Germany*, in this issue.

[46] *See* Krenn, *supra* note 6.

[47] *See* Çalı & Cunningham, *supra* note 6.

[48] The vast number of these guidelines and policies cannot be addressed here. *See* the individual contributions to this special issue. *See* also note 2.

Legal scholars have somewhat lagged behind these developments. To be sure, the literature on judicial independence[49] and judicial reforms[50] more generally has often touched upon judicial self-governance issues. Another important strand of research concerning the selection of judges has also acknowledged a growing role of judges in selecting their peers.[51] There is also a small but burgeoning scholarly literature on judicial councils,[52] and an even smaller set of studies on the role of Chief Justices and court presidents more generally.[53] However, a holistic view of judicial self-governance on the domestic level has been missing.

There is even less on judicial self-governance at supranational and international courts, despite the fact that these courts have far more autonomy in court administration, given the fact that they adopt their statutes by themselves and that they do not face a powerful executive and legislature. Only a few studies have analyzed the functioning of the Article 255 Panel, which plays a key role in screening new ECJ judges. Some commentators think

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[49] The literature on judicial independence is so numerous that it cannot be addressed here. For recent contributions to this literature that devoted significant attention to judicial self-governance, *see* in particular POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012); and ANJA SEIBERT-FOHR (ed.), JUDICIAL INDEPENDENCE IN TRANSITION (2012).

[50] *See e.g.* DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE (2010); MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012); Ramona Coman, *Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe*, 66 EUROPE-ASIA STUDIES 892 (2014).

[51] For an overview of this literature, *see* Samuel Spáč, *Recruiting European judges in the age of judicial self-government*, in this issue.

[52] *See* e.g. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. OF COMP. LAW 103 (2009); Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY JOURNAL OF INTERNATIONAL LAW 53 (2009); Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15(7) GERMAN L.J. 1257–1292 (2014); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils*, 89(7) TEXAS LAW REVIEW 1807–1833 (2011); Matthew C. Ingram, *Crafting Courts in New Democracies: Ideology and Judicial Council Reforms in Three Mexican States,* 44(4) COMPARATIVE POLITICS 439–358 (2012); Cristina E. Parau, *Explaining judiciary governance in Central and Eastern Europe: external incentives, transnational elites and Parliament inaction*, 67 EUROPE-ASIA STUDIES 409 (2015); DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016); Denis Preshova, Ivan Damjanovski & Zoran Nechev, *The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms*, 2017(1) CLEER PAPERS (2017); and Pablo José Castillo Ortiz, *Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe*, 9(2) HAGUE JOURNAL ON THE RULE OF LAW 315–336 (2017); Peter H. Solomon, *Transparency in the Work of Judicial Councils: The Experience of (East) European Countries*, 45 REVIEW OF CENTRAL AND EAST EUROPEAN LAW (2018). *See* also note 3.

[53] For an overview of this literature, *see* Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance,* in this issue.

that this Panel could be seen "as a germ of a council of judiciary within the Union"[54] or "some embryonic form of unintended judicial self-government",[55] or at least suggest that there is the potential for a "subtle move" in the direction of judicial self-governance.[56] Marc van der Woude's recent proposal goes even further and proposes a European Council of the Judiciary.[57] However, EU law scholars rarely engage with the role of CJEU President and other forms of judicial self-governance. The same applies to the ECtHR[58] and other international courts.[59] There are some studies on the selection of their judges,[60] but not much beyond that.[61]

In sum, despite the growing body of literature, there are still very few in-depth studies on judicial self-governance bodies and their interaction with other actors. Moreover, from the conceptual point of view, the current scholarly debate zeroes in on the impact of strong judicial councils advocated by the EU and the Council of Europe in Central and Eastern Europe, and to a great extent overlooks other forms of judicial self-governance such as a moderate judicial council in the Netherlands and the Court Service in Ireland. The rise of judicial self-governance within the traditional executive systems of court administration in Germany and Czechia attracted even less attention. Therefore, we still lack a comprehensive conceptual understanding of judicial self-governance in both "new" and "old" EU Member States and its dynamics over time. We know even less about the

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[54] Jean-Marc Sauvé, *Selecting the European Union's Judges: The Practice of the Article 255 Panel*, in SELECTING EUROPE´S JUDGES 78 (Michal Bobek ed., 2015). Even though from the conceptual point of view it is an example of judicial government rather than judicial *self*-government, since no CJEU judge sits on the Art. 255 TFEU Panel.

[55] Alberto Alemanno, *How Transparent is Transparent Enough? Balancing Access to Information versus Privacy in European Judicial Selections,* in SELECTING EUROPE´S JUDGES 204 (Michal Bobek ed., 2015).

[56] Tomas Dumbrovský, Bilyana Petkova & Marijn Van der Sluis, *Judicial appointments: the article 255 TFEU advisory panel and selection procedures in the Member States*, 51 COMMON MARKET LAW REVIEW 455 (2014).

[57] Marc van der Woude, *Towards a European Council of the Judiciary: Some Reflections on the Administration of the EU Courts,* in DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION. ESSAYS IN HONOUR OF JAPP W. DE ZWAAN 63 (Flora A.N.J. Goudappel & Ernst M. H. Hirsch Ballin eds., 2016).

[58] *See* Çalı & Cunningha, *supra* note 6; and MICHAL BOBEK (ed.), SELECTING EUROPE´S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (2015).

[59] *See* Nino Tsereteli & Hubert Smekal, *The Judicial Self-Government at the International Level: A New Research Agenda,* in this issue.

[60] For an overview of the literature, *see ibid*.

[61] For a rare exception, *see* Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the 'Black Box' of International Courts,* MICHIGAN JOURNAL OF INTERNATIONAL LAW (forthcoming).

rationales behind the rise and fall of judicial self-governance bodies[62] and about the effects of judicial self-governance.[63]

One may object that the rise and fall of judicial self-governance has little bearing on the greater scheme of things, especially in comparison to attacks on constitutional courts and open assaults on the judiciary such as criminal prosecution of "recalcitrant" judges,[64] reducing the retirement age of judges,[65] or jurisdiction stripping.[66] However, as I argued earlier, the recent judicial reforms in Hungary, Poland, and Turkey show that authoritarian and populist political leaders care about the control of judicial self-governance bodies and thus we should care as well.[67] Similarly, one often hears at the European level recently that it is all about the individuals and the institutional design does not matter. Yet several contributions to this special issue show that institutions actually matter. Therefore, we need to know how judicial self-governance bodies work, why they were established, what effects they have brought about, why they are challenged, and where the potential channels of politicization of the judiciary via these bodies lie.

This special issue aims to fill these gaps and addresses the implications of judicial self-governance for the "new" and "old" EU member states, for Turkey, as well as for the CJEU and the ECtHR. I am aware of the pitfalls of studying governance of the two European transnational[68] *courts* and governance of domestic *judiciaries* together.[69] Yet both

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[62] *See* Part D of this article.

[63] *See* Part E of this article. For exceptions, *see* Kosař, *supra* note 52; Castillo Ortiz, *supra* note 52; and Solomon, *supra* note 52.

[64] *See* Çalı & Durmuş, *supra* note 15; and Tom Ruys & Emre Turkut, *Turkey's Post-Coup 'Purification Process': Collective Dismissals of Public Servants under the European Convention on Human Rights*, 18(3) HUMAN RIGHTS LAW REVIEW 539–565 (2018).

[65] *See* the deleterious impact of these mechanisms in Poland (Śledzińska-Simon, *supra* note 7) and Hungary (Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50(4) COMMON MARKET LAW REVIEW 1145–1160 (2013); Tomás Gyulavári & Nikolett Hős, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, 42(3) INDUSTRIAL LAW JOURNAL 289–297 (2013); Gábor Halmai, *The early retirement age of the Hungarian judges*, in EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471-488 (Fernanda Nicola & Bill Davies eds., 2017).

[66] For instance, after the rise of Viktor Orbán in Hungary, the Hungarian Constitutional Court was early on stripped of its power to exercise constitutional review over budgetary and tax issues. See Michaela Hailbronner, *How Can a Democratic Constitution Survive an Autocratic Majority? A Report on the Presentations on the Judiciary,* VERFASSUNGSBLOG (Dec. 8, 2018), https://verfassungsblog.de/how-can-a-democratic-constitution-survive-an-autocratic-majority-a-report-on-the-presentations-on-the-judiciary/.

[67] *See supra* notes 8-10.

[68] In order to avoid lengthy conceptual debate, I am using the term "transnational courts" so as to cover both the ECtHR (which is an international court) and the CJEU (which is often treated as a supranational court sui generis).

theoretically and empirically there is much to gain from comparisons between these two levels.[70] Moreover, the CJEU and the ECtHR have been an integral part of the European legal space, as the current cases concerning the Polish and Hungarian judiciaries show,[71] and their governance might be used (and perhaps even misused) as a template on the domestic level. Therefore, this special issue zeroes in on judicial self-governance not only in 12 domestic European jurisdictions (Czechia, France, Germany, Ireland, Italy, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Turkey), but also at the European Court of Human Rights and the Court of Justice of the European Union.

Apart from the introductory article you are reading, this special issue consists of two parts: the abovementioned 14 case studies on judicial self-governance in individual jurisdictions and 5 cross-cutting articles that address common themes that have emerged from the contributions on individual jurisdictions. Each case study discusses the forms, rationales, and impact of judicial self-governance in a given jurisdiction. The horizontal articles analyze the role of court presidents, selection of judges, the specifics of judicial self-governance of international courts, the motivation of individual judges and how they act as a group, and the impact of establishment of a judicial council on public confidence in courts.

In what follows you will find a brief summary of each contribution, but I invite you to read all of the articles themselves, as I sincerely believe that in order to understand how the judiciary operates in a particular jurisdiction one must dig more deeply into the minds of lawyers, and particularly those of legal thinkers, in those legal systems to see how each of *them* understands their judiciary and its place within their legal systems. Only then may we 'try to understand the other legal system[s] on [their] *own terms*'.[72]

The special issue part focusing on case studies starts with the early birds of judicial self-governance – France, Italy, and Turkey. Antoine Vauchez[73] carefully traces how judicial self-governance fares in the country where the fear of the "*gouvernement des juges*" has haunted the political imagination for more than two centuries. He shows that judicial

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[69] It is obvious that the governance of the entire judiciary raises different issues than governance of a single court (and vice versa). *See* Çalı & Cunningham, *supra* note 6; Krenn, *supra* note 6; Tsereteli & Smekal, *supra* note 52. *See* also Part C of this article.

[70] On reflection, it would have been great to include in this special issue an article on judicial self-governance of domestic constitutional *courts*, which might be closer to judicial self-governance of the ECtHR and the CJEU than judicial self-governance of the general *judiciary*. However, it is for other researchers to fill this gap.

[71] *See supra* note 20.

[72] William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 AM. J OF COMP. L. 701 (1998).

[73] Vauchez, *supra* note 35.

governance *à la française* aims at striking a balance between an unacceptable judicial subordination to politics and an equally unacceptable corporatism. Despite the fact that this balance changes over time, the *Conseil supérieur de la magistrature* has so far not managed to erode the historical duopole mode of judicial governance relying on senior magistrates and high civil servants from the *Chancellerie* (the Ministry of Justice).

Simone Benvenuti and Davide Paris[74] show how the *Consiglio Superiore della Magistratura*, arguably the best Italian institutional export product, operates in its original setting. They argue that the success of the Italian judicial council model has depended on many endogenous and exogenous factors. In fact, it took 15 years to free the appointment of judges from the influence of the Ministry of Justice, and more than three decades to loosen the grip of senior judges and improve the internal independence of Italian judges. However, this came at the price of creating another potentially dangerous body – judicial associations (the so-called *correnti*) who now play an unprecedented role in Italian judicial governance.

Başak Çalı and Betül Durmuş[75] provide a fascinating account of the development of judicial self-governance in Turkey, which experimented with diverse forms of judicial governance ranging from no judicial self-governance, a co-option judicial council model, a hierarchical judicial council model, the executive controlled judicial council model and a pluralist judicial council model. All of these changes were driven by domestic causes and should be seen as a part of a larger trajectory of constitutional politics, marked by contestation with regard to the appropriate role of the judiciary in the Turkish political context. This difference of opinion deepened after the gradual entrenchment of a competitive authoritarian form of governance under the rule of the Justice and Development Party (AKP) and reached its climax after the failed coup attempt in 2016. As a direct response to the failed coup, the AKP not only curbed judicial self-governance, but also purged one quarter of the judiciary on the grounds that they had links to the Fetullahist Terrorist Organization.

Most Central and Eastern European countries established high councils for the judiciary during the accession process to the European Union. Both Slovakia and Romania are prime examples that closely followed the Euro-Model of judicial council, advocated by the European Commission and the Council of Europe. However, each of these two countries has struggled to cope with the new model. Bianca Selejan-Guțan[76] explains that the Superior Council of Magistracy strengthened corporatist features of the Romanian judiciary

[74] *See* Benvenuti & Paris, *supra* note 36.

[75] Çalı & Durmuş, *supra* note 15.

[76] *See* Selejan-Guțan, *supra* note 14.

with all the accompanying negative effects such as the lack of transparency and minimal accountability. Yet she argues provocatively that, given the high level of corruption that plagues Romanian society and the culture of obedience within the Romanian judiciary, this is a "lesser evil". Samuel Spáč, Katarína Šipulová, and Marína Urbániková[77] provide a more skeptical picture about the Slovak judicial self-governance as they conclude that, with the help of politicians, the Judicial Council of the Slovak Republic was hijacked by judges who used their powers to capture the judiciary from inside. These judges have used their powers in such a manner that helped them to protect their interests. Yet the increasing transparency of the Slovak judicial governance shows signs of hope.

The next group of cases include jurisdictions that have recently moved from the traditional model of judicial governance with the central role of the Ministry of Justice, but have not embraced the idea of a strong judicial council based on the Euro-template. Aida Torres Pérez[78] shows how the selection of judicial members of the General Council of the Judiciary by politicians and the Council's internal practices led to its politicization, which has in turn contributed to undermining public confidence in the Spanish judiciary.

Elaine Mak[79] explains how the new public management theories of governance transformed the Dutch judiciary institutionally as well as mentally. The Netherlands abandoned the original flat organizational structure for a centralized and more hierarchical management, with the key role of the Council for the Judiciary and the Management Boards. However, the new more "business like" approach to judicial governance, which praises efficiency, effectiveness, and client-oriented mindset, has sometimes collided with the traditional rule of law of values. This in turn led to occasional skirmishes, revolving around claims of autonomy, between judges and the Council for the Judiciary as well as between the Council for the Judiciary and the Ministry of Justice and Security.

But these skirmishes are incomparable to the frontal assault on the judicial branch and the judicial self-governance in Poland, as Anna Śledzińska-Simon[80] attests. The 2017 package of judicial reforms pushed by the Law and Justice Party through *Sejm* not only altered the mode of electing its judicial members of the National Council of the Judiciary, but also concentrated the power over the judiciary in the hands of the executive branch. This

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[77] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[78] *See* Torres Pérez, *supra* note 39.

[79] *See* Mak, *supra* note 37. However, note that the Netherlands cannot be easily squeezed into the judicial council model – it introduced the Council for the Judiciary, but powers concerning appointing, promoting and disciplining judges do not lie with the Council for the Judiciary, but sometimes with the government, sometimes with the judiciary authorities, and sometimes they are shared.

[80] *See* Śledzińska-Simon, *supra* note 7.

allowed the Polish political leaders to replace important court presidents and pack the Supreme Court. The remaining two jurisdictions in this group show that in smaller countries personal relations and informal networks play a more important role than the institutional design.

Patrick O'Brien[81] argues that judicial independence and judicial self-governance in Ireland depend on the support of politicians and a culture of mutual respect. If personal relationships break down (as they did between 2011 and 2013), essential relationships between government and the judiciary can be difficult to operate. He also shows that politicians as well as court presidents value the potential for patronage involved in judicial appointments and thus have been unwilling to relinquish control in that area. He concludes that to understand the recent debates about the Judicial Appointments Commission and the Judicial Council, getting the politics right is a key.

Matej Avbelj[82] exposes the significant gap between the Slovenian judicial self-governance in the books and the way it is conducted in practice. He demonstrates how the remnants of the communist totalitarian past and the dense formal and informal networks in a relatively small Slovenian legal and political community have been used to manipulate the legal system of judicial self-governance so as to detract from rather than to contribute to the values associated with the judiciary in a well-functioning constitutional democracy.

The remaining two domestic jurisdictions represent the "black sheep" that have so far resisted the introduction of any form of a judicial council. Contrary to general wisdom, both Germany and Czechia show a significant dose of judicial self-governance. Fabian Wittreck[83] rebuts the myth that Germany is a persistent objector to judicial self-governance. In fact, German court administration features as many as eight judicial self-governance bodies. These bodies range from Presidia, councils of judges (*Richterräte*), two judicial appointment committees and court presidents to service courts, penal courts, and civil courts deciding on the civil liability of judges. Germany thus advances a different conception of judicial self-governance, which reflects the prevailing German understanding of democratic legitimacy and separation of powers.

In a similar vein, Adam Blisa, Tereza Papoušková, and Marína Urbániková[84] argue that judicial self-governance cannot be conflated with judicial councils as Czech judges have

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[81] O'Brien, *supra* note 31.

[82] *See* Avbelj, *supra* note 41.

[83] *See* Wittreck, *supra* note 45.

[84] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

their say in many issues of judicial governance. They show how Czech court presidents have gradually managed to erode the role of the Ministry of Justice and how they became key players in court administration. However, this comes at a price – the Czech judicial (self-)governance is opaque and rests on the fragile balance between the court presidents and the political actors.

Finally, the last two case studies analyze judicial self-governance at the European Court of Human Rights and the Court of Justice. Başak Çalı and Stewart Cunningham[85] show that the scope of judicial self-governance at the ECtHR is highly variable. While judicial self-governance at the point of judicial selection is at best 'embryonic', since this process continues to favor the primacy of the Parliamentary Assembly of the Council of Europe, sitting ECtHR judges, once elected, enjoy unbounded powers with respect to the management of the ECtHR's judicial activities. In particular, the President of the Court as well as Section Presidents, alongside the Jurisconsult and the Registry, exercise judicial self-governance in managing the Court's work and giving it jurisprudential direction. Başak and Stewart's central argument is twofold. First, in terms of values, they suggest that the current practices of judicial self-governance at the ECtHR are better at promoting legitimacy and judicial independence but far weaker on transparency and accountability. Second, the differences in reach and form of judicial self-governance at the pre- and post-election processes strike a careful balance in respecting the separation of powers and the democratic principle, but this balance should not be taken for granted.

Christoph Krenn[86] then traces the development of the governance model of the Court of Justice of the European Union, which builds heavily on the International Court of Justice template. He argues that this has led to communal judicial self-governance, which has fostered professionalism and strengthened the loyalty of the CJEU's judges and advocates general towards the institution. However, two challenges to this governance loom large – the growth of the CJEU (and especially the effective inclusion of the General Court in the CJEU's governance structure) and the CJEU's controversial active participation in the EU's legislative process.

After these rich case studies on judicial self-governance in particular jurisdictions, this special issue picks up important horizontal issues that run through most of the contributions. Adam Blisa and David Kosař[87] argue that court presidents are a missing piece in judicial governance. They conceptualize the powers of court presidents, create the Court Presidents Power Index, and identify the contingent circumstances that affect to what

[85] *See* Çalı & Cunningham, *supra* note 6.

[86] *See* Krenn, *supra* note 6.

[87] *See* Blisa & Kosař, *supra* note 53.

extent court presidents may exploit their powers in practice. Based on these insights they also question the widely held opinion that the Western and the Eastern Europe view the roles of court presidents differently. In fact, powers of court presidents diverge significantly both within the Western Europe and within the Eastern Europe, and hence it is difficult to draw the easy line along the West/East axis on this ground.

Samuel Spáč[88] focuses on the selection of judges in the age of judicial self-governance and tracks down the increasing involvement of judges in selecting their peers. To explain the latter phenomenon he suggests viewing the process of recruiting judges as a funnel, which consists of four stages, where candidates are gradually eliminated until only one or a few remain. Then he argues that in order to analyze judicial recruitment and its consequences we need not only to understand the formal rules and identify the actors involved in the process, but also to study their preferences and pay attention to the stages of the process in which they shape the recruitment. Only then can we reveal the real influence of judicial self-governance on the composition of the domestic bench.

Marína Urbániková and Katarína Šipulová[89] draw a novel concept map of factors influencing public confidence in the judiciary and offer a unique view on the relationship between judicial councils and the level of public confidence in courts on their own. They raise doubts about the ability of judicial councils to enhance confidence in courts, since the EU countries without judicial councils are better off in terms of public confidence. More specifically, they conclude that the existence of judicial councils does not make a difference regarding public confidence in the judiciary in the new EU member states, while in the old EU member states judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them. This does not necessarily mean that the existence of a judicial council is to be blamed for lower public confidence. Instead, the authors argue that judicial councils have only limited power to deal with the structural causes of low public confidence in courts, which often has deeper cultural and societal roots.

The remaining two articles focus on international courts. Hubert Smekal and Nino Tsereteli[90] draw attention to judicial self-governance at the international level and provide a unique analysis of the selection, promotion, and removal of judges of as many as 24 international courts. They show that while judicial self-governance manifests itself relatively strongly in the promotion and removal of international judges, it is limited in

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[88] Spáč, *supra* note 51.

[89] *See* Marína Urbániková & Katarína Šipulová, *Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?,* in this issue.

[90] See Tsereteli & Smekal, *supra* note 52.

their selection. However, sitting judges of some international courts have become increasingly involved in the expert bodies that decide or advise on selecting new judges, and thus we can witness the gradual rise of judicial self-governance even in this area.

Finally, Shai Dothan[91] moves from the institutional design issues to the actual behavior of judges on the international bench. He shows that the states' influence on the selection of international judges raises the concern that judges are biased in favor of their home states. He argues that this concern cannot be refuted merely by the fact that the international courts usually sit in large and diverse panels, since judges may start forming coalitions among themselves, giving judges with national biases a practical opportunity to change the results of cases. Building on insights from the judicial behavior literature he analyzes how international judges act together as a group and eventually concludes that one way of limiting the national bias of international judges is to increase judicial self-governance (e.g. by allowing judges or presidents of international courts to have greater influence on the appointment of their future peers).

C. Forms of Judicial Self-Governance

Based on the insights from the contributions to this special issue, this Part problematizes the forms of judicial self-governance in Europe. More specifically, it argues that it is high time to look beyond judicial councils and study and to view judicial self-governance as a much more complex network of actors and bodies with different levels of participation of judges. This requires focusing on de facto judicial self-governance, the identification of other actors within the judiciary who may engage in judicial governance (such as judicial appointments commissions, promotion committees, and court presidents), taking into account the liquid nature of judicial self-governance, and acknowledgment of the fact that the rise of judicial self-governance may lead to political contestation and the creation of new channels of politicization of the judiciary. Subsequently, it identifies dimensions of judicial self-governance that should allow us to see judicial self-governance more sharply in future.

I. From Judicial Councils *to Judicial Self-Governance* Bodies

As mentioned above, the existing literature on judicial self-governance suffers from several limits. First, it focuses predominantly on judicial councils and neglects *other forms* of judicial self-governance such as the Courts Service[92] or specialized judicial appointments

[91] Shai Dothan, *The Motivations of Individual Judges and How They Act as a Group*, in this issue.

[92] *See* the analysis of the functioning of the Court Service in Ireland (in O'Brien, *supra* note 31).

bodies.[93] A related problem is that there is too much emphasis on judicial self-governance bodies operating at *national* level. Virtually all contributions to this special issue show that we also need to look at judicial self-governance bodies operating at each court such as court presidents,[94] management boards,[95] personnel councils,[96] judicial boards,[97] and presidia (*Präsidien*).[98]

The second drawback of the existing literature is that it attempts to squeeze all forms of JSG into the existing "models" (such as the judicial council model, the Ministry of Justice model, and the Court Service model)[99] of court administration that do not do justice to the richness and diversity of judicial self-governance. Moreover, this approach overlooks the fact that in many countries there are *several* JSG bodies (such as the Court Service coupled with the Judicial Appointments Advisory Board and court presidents,[100] judicial council coupled with national selection committee and court presidents,[101] the judicial council coupled with court presidents,[102] or court presidents coupled with judicial boards[103]). From the conceptual point of view, it is critical to acknowledge this fact and understand the dynamics between these bodies and their personal overlaps rather than trying to put each judicial system under the rubric of a certain ideal model.

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[93] *See* the Judicial Appointments Advisory Board in Ireland (in O'Brien, *supra* note 31), or *Präsidialräte* and *Richterwahlausschüsse* in Germany (in Wittreck, *supra* note 45). However, note that selection of the CJEU's and ECtHR's judges

[94] *See* Blisa & Kosař, *supra* note 53.

[95] *See* Mak, *supra* note 37.

[96] *See* Avbelj, *supra* note 41.

[97] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[98] *See* Wittreck, *supra* note 45.

[99] I should acknowledge that I myself contributed to this simplification. *See* Bobek & Kosař, *supra* note 52.

[100] *See* the situation in Ireland analyzed in O'Brien, *supra* note 31.

[101] *See* Mak, *supra* note 37.

[102] *See e.g.* the situation in Slovakia dealt with in Spáč, Šipulová & Urbániková, *supra* note 31.

[103] *See* e.g. the situation in Czechia analyzed in Blisa, Papoušková & Urbániková, *supra* note 42.

The other drawbacks are also well known. Most of the literature written in English[104] focuses on judicial councils in *Central and Eastern Europe*, which frames the debate and gives it (owing to the specifics of post-communist judiciaries) a peculiar shape. Moreover, a significant part of the policy guidelines and scholarship on judicial self-governance suffers from *normative bias*, as many scholars and policymakers have presumed that the rise of judicial self-governance is a one-way path and an unquestionable good. However, the developments in Hungary (where Viktor Orbán created the brand new National Office for the Judiciary, chaired by his loyal supporter Tünde Handó, and hollowed out the powers of the existing the National Judicial Council[105]) and Poland (where Jaroslav Kaczyński packed the National Council of the Judiciary with his supporters and even threatened to revert to the Ministry of Justice model[106]) show that judicial self-governance can be reduced and even abused to the detriment of individual judges.[107] This brings us to the final limit of the existing literature, which is the *static* view of judicial self-governance. Even if we leave aside Poland, where one judicial reform follows the other, virtually every contribution to this special issue shows that judicial self-governance has developed over time. Some countries even modified judicial self-governance back and forth several times.

In order to avoid these drawbacks, this special issue deliberately adopts a broad definition of judicial self-governance. For its purposes, "judicial self-governance body" is a body with at least one judge whose primary function, entrenched in a legal norm, is to (a) decide about issues regarding court administration and/or the career of a judge, and/or (b) advise those who decide about such issues.[108]

Such broad definition has several advantages. First, it includes not only judicial councils, but also judicial appointments commissions and similar bodies, the Court Service, court presidents, Supreme Courts (if vested with court administration), management boards or

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[104] There is of course relevant literature in local languages (see e.g. DANIELA PIANA & ANTOINE VAUCHEZ, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA 142 et seq. (2012); ERIK LÁŠTIC & SAMUEL SPÁČ (EDS.), NEDOTKUNTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993 – 2015 (2018); FABIAN WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT (2006); and LEA C. FAISSNER, DIE GERICHTSVERWALTUNG DER ORDENTLICHEN GERICHTSBARKEIT IN FRANKREICH UND DEUTSCHLAND 251 et seq. (2018), but it is to a large extent not accessible to English speaking readers.

[105] *See* Kosař & Šipulová, *supra* note 20; and Benjamin Novak, *Two Hungarian law school professors discuss Hungary's deteriorating political and legal culture*, THE BUDAPEST BEACON (Apr. 6, 2018), https://budapestbeacon.com/two-hungarian-law-school-professors-discuss-hungarys-deteriorating-political-and-legal-culture/?_sf_s=fleck.

[106] *See* Śledzińska-Simon, *supra* note 7.

[107] The recent reports that in Hungary and Poland "disloyal" judges are increasingly threatened with disciplinary sanctions confirm it. *See* Hailbronner, *supra* note 66.

[108] *See also supra* notes 21-23.

judicial boards at each court, *Präsidia* in Germany, *commissions d'avancément* in France, as well as the Article 255 TFEU Panel for selection of Court of Justice judges and the CM Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR. This in turn gives a more accurate picture of the degree of judicial self-governance in each jurisdiction than the traditional focus on judicial councils. In fact, it makes clear that judicial self-governance cannot be conflated with judicial councils (and vice versa). Second, it exposes personal overlaps between various judicial self-governance bodies. For instance, court presidents are themselves judicial self-governance bodies, but they may often also sit on judicial councils or selection and promotion committees. This "judicial self-governance nesting" cannot be addressed here, but should be the subject of future research.

Third, it allows us to see the actual role of judges in the governance of the judiciary rather than the role assigned to them on paper. In fact, it fully exposes that the reality defies traditional models of court administration. For instance, Başak Çalı and Betül Durmuş show that the Ministry of Justice (1971-2010) and later on the Presidential administration (2017-now) can be dominant even under the judicial council model.[109] Similarly, a theoretically strong Slovenian judicial council is rather weak and the real decisions regarding judicial governance are made elsewhere.[110] Conversely, German and Czech contributions rebut the myth that Czechia and Germany are persistent objectors to judicial self-governance. In fact, Czech as well as German judges, each group in its own way, have been very influential in governing the judiciary, despite the nominally prevailing Ministry of Justice model. German judges sit on eight judicial self-governance bodies that have significant say in the appointment and promotion of judges, case assignment, the disciplining of judges as well as in many other issues of judicial governance.[111] The Czech version of judicial self-governance is more fragile since it relies primarily on Czech court presidents, who managed to erode the role of the Ministry of Justice and became key players in court administration.[112] Contrary to general wisdom, judicial self-governance can actually be practiced at the Ministry of Justice. For instance, the most powerful public servants within the Austrian Ministry of Justice (so called "Sektionschefs", heads of large departments within the Ministry of Justice) are actually judges temporarily assigned to the Ministry of Justice.[113]

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[109] Çalı & Durmuş, *supra* note 15.

[110] Avbelj, *supra* note 41.

[111] *See* Wittreck, *supra* note 45.

[112] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[113] I am grateful to Markus Vašek for this insight.

Other contributions also expose gaps between de iure and de facto judicial self-governance. In Slovakia, the constitutional design of its judicial council supposes a parity of judges elected by their peers with non-judicial members appointed/elected by political actors, but in practice judges have always had a majority on the Judicial Council of the Slovak Republic, since political actors decided to nominate judges as their candidates.[114] Among the many repercussions of this development are the collision between "political" judicial members and "judicial" judicial members on the judicial council and the gradual rise of judicial associations.

Due to our broad definition, even judicial self-governance at the CJEU and the ECtHR can be seen in a different light. If we go beyond the Article 255 Panel and take into account the role of the CJEU's president, who is one of the strongest court presidents in Europe,[115] the significant financial[116] and administrative[117] autonomy of the CJEU, and a de facto legislative role in regulating its own affairs,[118] then we realize that this is not just "some embryonic form" of judicial self-government"[119] or a "subtle move" in the direction of judicial self-governance.[120] It is rather a different type of judicial self-governance than the one we associate with judicial councils. Similarly, the ECtHR has relatively weak levels of judicial influence on the selection of judges, it enjoys a high degree of control over court administration,[121] and the ECtHR's President also wields significant powers, albeit not as strong as his CJEU counterpart.[122]

These findings confirm that judicial self-governance is a far more complex phenomenon than judicial councils and there might be significant dissonance between de iure and de

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[114] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[115] Blisa & Kosař, *supra* note 53.

[116] *But see* Christoph Krenn, *The European Court of Justice's Financial Accountability. How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process*, 13 EUROPEAN CONST. LAW R., 253 (2017) (who argues that the European Parliament checks for CJEU's mismanagement and gives political guidance on broader issues of CJEU's administration through the EU's budgetary process).

[117] *See* Krenn, *supra* note 6.

[118] On the regulatory self-governance of the CJEU, see Part C.II below.

[119] Alemanno, *supra* note 55.

[120] Dumbrovský, Petkova & Van der Sluis, *supra* note 56.

[121] *See* Çalı & Cunningham, *supra* note 6.

[122] *See* Blisa & Kosař, *supra* note 53.

facto judicial self-governance. It goes without saying that de facto judicial self-governance matters more, but in order to know more about it we need to go beyond the de iure composition and formal powers of judicial self-governance bodies. To be sure, it is important to know whether judges have a majority,[123] parity[124] or minority[125] in judicial councils and other collective judicial self-governance bodies, and who nominates the other members. However, it is also necessary to ask further and examine other factors that shape judicial self-governance bodies: who are the "other members" of these bodies, who selects the judicial members and from which echelons of the judiciary do these judges come, who presides over judicial self-governance bodies, what tiers of the judiciary we are talking about, and what are their informal relations.

For instance, judges and prosecutors are indistinguishable in France, Italy, Romania, and Turkey, but there is a world of difference between them and the roles of court prosecutors in these countries.[126] Polish, Spanish, and Turkish contributions show that when politicians can select the judicial members of judicial councils, that inevitably leads to the politicization of the judiciary,[127] or at least to the perception of "distance" between judges and the judicial council.[128] However, even if judges can elect their representatives, that does not mean that political ties do not matter. In France and Italy, judicial associations, often associated with a certain political party or at least a certain worldview, actually have a major say on who sits on judicial self-governance bodies and how these bodies decide important issues.[129] Slovakia then serves as a cautionary tale, as it shows that the judicial council can also be captured from inside by one of the factions within the judiciary.[130]

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[123] *See* e.g. judicial councils in Italy, Romania, and de facto also in Slovakia.

[124] *See* e.g. judicial councils in the Netherlands (however, the judicial member who is the president of the Dutch judicial council has a casting vote) and de iure also in Slovakia.

[125] *See* e.g. judicial councils in Spain and France, and the Judicial Appointments Advisory Board in Ireland.

[126] *See* Vauchez, *supra* note 35; Benvenuti & Paris, *supra* note 36; Selejan-Guțan, *supra* note 14; and Çalı & Durmuş, *supra* note 15.

[127] *See* Śledzińska-Simon, *supra* note 7; Torres Pérez, *supra* note 39; and Çalı & Durmuş, *supra* note 15.

[128] *See* Mak, *supra* note 37.

[129] *See* Vauchez, *supra* note 35; Benvenuti & Paris, *supra* note 36. Judicial associations are also strong in Slovakia and Spain (Spáč, Šipulová & Urbániková, *supra* note 31; and Torres Pérez, *supra* note 39).

[130] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

Who presides over the judicial self-governance body is equally important. For instance, some judicial councils are chaired by the head of state,[131] while in other jurisdictions the chair is usually a lower court judge,[132] a former court president,[133] or the Chief Justice who presided[134] or presides[135] over the judicial council. Interestingly, the dual role of the Chief Justice (in particular the presidency of the Supreme Court and the chairmanship of the judicial council) has become increasingly problematic, in both Eastern and Western Europe. The Slovak contribution explains how this dual role, which concentrated too much power in the hands of one person, contributed to the capture of the Judicial Council of the Slovak Republic and selective disciplinary motions against judges who dared to criticize the Chief Justice.[136] One may object that this is due to the peculiar personal characteristic of the Slovak Chief Justice, Štefan Harabin. However, the recent Grand Chamber judgment of the ECtHR in *Ramos Nunes de Carvalho e Sá v Portugal* fully reveals that this is actually a structural problem.[137] Therefore, it comes as no surprise that several countries have divided these two roles and vested the judicial council chairmanship in someone other than the Chief Justice.[138]

Similarly, it matters who are the judicial members of the judicial self-governance bodies. In some countries lower court judges dominate judicial self-governance bodies,[139] while elsewhere apex court judges[140] or court presidents[141] have a major say. We may then

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[131] This is the case of Italy. Until the 2008, the head of state chaired also the French judicial council.

[132] *See* Bogdan Iancu*, Perils of Sloganised Constitutional Concepts, Notably that of 'Judicial Independence'*, 13(3) EUROPEAN CONST. LAW R. 582, 593 (2017) (explaining that Romanian judicial council's "three ex officio members (Minister of Justice, President of the High Court of Cassation and Justice, Prosecutor General of the General Prosecutor's Office attached to the High Court of Cassation and Justice) have no right to vote in the two sections, which serve as first instance disciplinary courts for judges and prosecutors, respectively.").

[133] This is currently the situation at the Dutch judicial council.

[134] This was the case of Slovakia until the 2014 reform.

[135] The Chief Justice chairs, among others, judicial councils in France and Spain.

[136] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[137] *See* Ramos Nunes de Carvalho e Sá v Portugal, *supra* note 13; and especially concurring opinion of Judge Pinto de Albuquerque therein.

[138] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[139] This is the case of judicial councils in Italy and Romania.

[140] The best example is the Turkish judicial council during its hierarchical judicial self-governance period (1961-2010) and the Romanian judicial council between 1991 and 2003. For further details see Çalı & Durmuş, *supra* note 15; and Selejan-Guțan, *supra* note 14.

speak of hierarchical and non-hierarchical judicial self-governance bodies,[142] depending on the composition of the "judicial element" of these bodies. Finally, it is important to know over which tiers of the judiciary each judicial self-governing body rules. For instance, while in some countries judicial councils decide on matters of judicial governance at all tiers of the judiciary,[143] in other jurisdictions a judicial council has no say over issues concerning the Supreme Court.[144]

This wide variety of judicial self-governance bodies in Europe, in terms of both their composition and their powers, is actually consequential and can guide our debates on constitutional resilience.[145] The standard approach to constitutional resilience of the judiciary vis-à-vis political attacks, prompted primarily by the events involving the judiciary in Hungary and Poland, is to increase and entrench judicial self-governance. Based on the insights from the contributions to this special issue, I would like to caution against such rosy view of judicial self-governance.

First, in terms of competences, the rule of thumb is that the more power a given judicial self-governance body has, the more attention it attracts from politicians. Politicians usually do not care about Judicial Academies or less influential judicial self-governance bodies such as judicial boards in Czechia or the Judicial Appointments Advisory Board in Ireland. These bodies often operate below their radar. However, politicians care about strong judicial councils and powerful court presidents. As a result, the diffusion of powers in the area of judicial governance among different bodies, perhaps even with a different composition, might be a better solution than the creation of the strong judicial council, which concentrates virtually all powers into one institution, because the former solution is more resistant to capture.

Second, the creation of the judicial self-governance body does not make the power disappear or the dangers evaporate. Power is just transferred to other hands and new channels of politicization of the judiciary are created.[146] These channels differ from one

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[141] This was the case of the Slovak judicial council until 2014.

[142] *See* also Garoupa & Ginsburg, *supra* note 52; and Carlo Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy?*, 49(3) REPRESENTATION – JOURNAL OF REPRESENTATIVE DEMOCRACY 347, 348 (2013).

[143] *See* e.g. judicial councils in Poland, Romania and Slovakia.

[144] This is the case of the Netherlands.

[145] *See* the ongoing symposium on constitutional resilience at Verfassungsblog (Christoph Grabenwarter, *Constitutional Resilience,* VERFASSUNGSBLOG (Dec 6, 2018), https://verfassungsblog.de/constitutional-resilience/).

[146] *See* also Wittreck, *supra* note 45 (arguing that "The mechanisms of self-government merely shift the dangers for individual judicial independence by shifting power.").

jurisdiction to another. The Slovak judiciary was politicized through the dominant role of the Chief Justice in the judicial council.[147] The Polish judiciary has recently been politicized not only by the Minister of Justice, but also through court presidents and the new members of the National Council of the Judiciary elected by the parliamentary majority.[148] In France and Italy, the major channels of politicization of the judiciary are arguably not the non-judicial members of their judicial councils, but judicial associations.[149] In Germany, the main channel of politicization are the promotion committees.[150] In Hungary, the major channel of politicization of the judiciary is the new National Office for the Judiciary.[151] In Spain and Turkey, politicization of the judiciary has flourished due to the (s)election of judicial members of the judicial council by political branches. The difference is that while the Spanish judicial council has been captured by political parties,[152] in Turkey it is the presidential administration that currently has the major grip over the judicial council.[153] In Ukraine, the main threat arguably comes from prosecutors who sit on the judicial council.[154] Prosecutors have a strong position also in the Romanian judicial system.[155] In fact, tinkering with their independence could be more attractive than trying to influence judges, simply because the latter would arouse a lot more opposition.[156]

Third, the Slovak case study shows that judicial councils can be captured not only from the outside, but also from the inside.[157] Unfortunately the Polish scenario attests that

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[147] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[148] Śledzińska-Simon, *supra* note 7.

[149] *See* Guarnieri, *supra* note 142; and Benvenuti & Paris, *supra* note 36 (on *correnti* in Italy); and Vauchez, *supra* note 35 (on judicial associations in France).

[150] *See* Wittreck, *supra* note 45.

[151] *See* note 105.

[152] Torres Pérez, *supra* note 39.

[153] Çalı & Durmuş, *supra* note 15.

[154] Denisov v Ukraine, *supra* note 12.

[155] *See* Selejan-Guțan, *supra* note 14.

[156] *See* Anne van Aaken, Lars P. Feld & Stefan Voigt, *Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation Across 78 Countries*, 12(1) AMERICAN LAW AND ECONOMICS REVIEW, 204-244 (2010); and Stefan Voigt & Alexander J. Wulf, *What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence*, JOURNAL OF INSTITUTIONAL ECONOMICS, 1-22 (2017).

[157] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

politicians always find some judges who are willing to cooperate with them, no matter how obvious the intentions of the judicial reform are.[158] As I argued elsewhere, the wide role of the Ministry of Justice in judicial governance may sometimes be a lesser evil, since it is the "the devil we know", Minister's abuses are more visible, and it is easier to mobilize people against them.[159]

Finally, one should not forget informal networks that may capture judicial self-governance bodies. While Tünde Handó's proximity to Viktor Orbán is well-known,[160] to uncover such informal relations in other jurisdictions might be extremely difficult, yet crucial. For instance, in Slovenia one can hardly assess the functioning of the judicial council without knowing the dense web of informal networks that made important decisions outside the judicial council.[161] In France, Italy, and Spain it is crucial to know who belongs to which judicial association.[162] In Czechia court presidents created several informal groups that have a major say in key areas of judicial governance.[163] Shai Dothan shows that informal coalitions may emerge also among judges of the ECtHR.[164] Samuel Spáč then carefully analyzes how informal networks may affect different stages of recruitment of judges.[165] Fortunately, recent scholarship has made significant progress in conceptualizing and analyzing such informal networks[166] and it is high time to apply these insights to European judiciaries as well.

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[158] *See* Śledzińska-Simon, *supra* note 7.

[159] *See* Kosař, *supra* note 52. Note that Hungarian judges often refer to the period between 1990 and 1996, when the court administration was the responsibility of the Ministry of Justice as to the „golden era" (https://budapestbeacon.com/two-hungarian-law-school-professors-discuss-hungarys-deteriorating-political-and-legal-culture/?_sf_s=fleck)

[160] *See supra* note 105.

[161] *See* Avbelj, *supra* note 41.

[162] *See* Vauchez, *supra* note 35; Benvenuti & Paris, *supra* note 36; and Torres Pérez, *supra* note 39).

[163] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[164] *See* Dothan, *supra* note 91.

[165] *See* Spáč, *supra* note 51.

[166] *See* Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, The Informal Dimension of Judicial Politics: A Relational Perspective, 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 413 (2017); and the special issue on 'Courts and Informal Networks' in Volume 39(5) INTERNATIONAL POLITICAL SCIENCE REVIEW (2018).

II. From Judicial Self-Governance Bodies *to Judicial Self*-Governance

Most judicial self-governance studies focus on the *bodies* involved in judicial self-governance. This special issue follows this approach and the case studies as well as Part C.I of this article are framed around judicial self-governance bodies. However, several contributions to this special issue invite more thorough thinking about the *dimensions* of judicial self-governance.[167] The major advantage of this approach is that while judiical self-governance bodies either exist or do not exist (hence it is a binary variable), judicial self-governance is a matter of scale and also encompasses informal judicial actors, which in turn allows us to better analyze the extent of control judges can exercise over the judiciary.

Until recently, most studies focused primarily on *personal* self-governance, which concerns judicial careers (namely issues of selection, promotion, and disciplining of judges) and *administrative* self-governance, which covers issues such as panel composition and case assignment. The rise of specialized judicial academies and involvement of judges in educating their peers (i.e. *education* self-governance) are also well documented.[168] Virtually every case study in this special issue discusses these dimensions as well.

But some contributions go beyond that and provide interesting insights about other dimensions of judicial self-governance. For instance, the Czech and German contributions raise important issues regarding *digital* self-governance. Fabian Wittreck explains that the electronic file and other measures of digitization of the judiciary may profoundly change the working-place of judges.[169] Authors of the Czech case study concur.[170] However, challenges in digital self-governance may also take other forms. For instance, Czech judges have had trouble searching for information online as the Czech Ministry of Justice blocks many websites on computers in the court buildings on dubious grounds.

Participation in the budget negotiation and discretion regarding the distribution of the court budgets is perhaps even more important, as budget cuts are a subtle but effective tool for shaping the judiciary, in both good[171] and bad[172] ways. Hence, *financial* self-

[167] I leave aside the abstract conceptual disputes regarding term governance. Governance, much like government, is notoriously difficult to define as it has at least four meanings in the literature: a structure, a process, a mechanism and a strategy (*see* David Levi-Faur, *From "Big Government" to "Big Governance"?,* in THE OXFORD HANDBOOK OF GOVERNANCE 3-18 (David Levi-Faur, 2012)).

[168] *See e.g.* CRISTINA DALLARA & DANIELA PIANA, NETWORKING THE RULE OF LAW: HOW CHANGE AGENTS RESHAPE JUDICIAL GOVERNANCE IN THE EU 87–110 (2016).

[169] *See* Wittreck, *supra* note 45.

[170] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[171] *See* Krenn, *supra* note 6.

governance comes to the fore. Both transnational courts also exhibit significant *ethical* self-governance via their rules of procedure or court statutes.[173] More recently, the CJEU adopted its Code of Conduct in 2007[174] and revised it in 2016.[175] Similarly, in 2008 the ECtHR adopted the Resolution on Judicial Ethics that imposes only 'soft' standards for judicial behavior.[176] On the domestic level, judicial councils often take the lead in judicial ethics. For instance, the French judicial council responded to the judicial scandals in the early 2000s by adopting the ethical rules (*Recueil des obligations déontologiques du magistrat*), which provide guidelines on what "normal professional behavior" of French judges is.[177]

Several contributions have also shown the importance of *information* self-governance. For instance, in Czechia the Supreme Court and the Supreme Administrative Court have initiated the publication of all judgments online.[178] Slovakia went even further and provides a significant amount of information about the activity of individual judges[179] as well as about individual candidates for a judicial position.[180] The other contributions show that information self-governance covers a wide set of issues, and that the approach of European jurisdictions varies a lot in this respect. Therefore, this dimension of self-governance is particularly apt for further research. Moreover, in future the GDPR implementation can become a major issue as well.

Judicial self-governance at the ECtHR and the CJEU also provides a novel conceptual insight as one specific dimension of judicial self-governance that is not so visible at the domestic level emerges at the supranational level – *regulatory* self-governance. By *regulatory* self-governance I mean the unique power of the ECtHR's and the CJEU's judges to determine

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[172] Financial pressure can be easily abused, for instance against a critical court president and "her" court.

[173] *See* Krenn, *supra* note 6; and Çalı & Cunningham, *supra* note 6.

[174] Code of Conduct [2007] OJ C223/1.

[175] Code of Conduct for Members and former Members of the Court of Justice of the European Union [2016] OJ C483/1. For more details see Krenn, *supra* note 6.

[176] European Court of Human Rights, Resolution on Judicial Ethics, 23 June 2008, http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf. For more details see Çalı & Cunningham, *supra* note 6.

[177] *See* Vauchez, *supra* note 35.

[178] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[179] Note that, for instance, in Slovakia such information is available through the website https://otvorenesudy.sk/.

[180] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

the primary rules regarding their organization (such as organization of sessions and deliberations, setting up sections and chambers, and determining case allocation) and procedure as well as to regulate matters regarding the judicial careers of their members (such as disciplining and removal of judges, election of the court presidents and section presidents etc.).[181]

In contrast to domestic courts, where these primary rules are determined by the legislature (typically in the Law on Courts), at the transnational level it is the ECtHR and the CJEU themselves who play the major role in formulating the rules that govern their activities. They do so via the adoption of the court' statutes, rules of procedure, regulations, and guidelines governing the functioning of their courts and/or behavior of judges.[182] This unprecedented autonomy results from the lack of classical tripartite separation of powers at the Council of Europe[183] and a peculiar separation of powers in the European Union.[184] What is crucial for the conceptual understanding of judicial self-governance is that in some jurisdictions judges are not only granted administrative, financial and ethical self-governance, but are also vested with the power to determine the very scope of their powers in these areas. Moreover, regulatory self-governance gives transnational courts a competitive edge in judicial reform processes, for example, by proposing treaty amendments or commenting on governmental initiatives.[185]

Based on these insights, I suggest unpacking judicial self-governance into smaller units. This would allow us to study in which areas judges have their say and to what extent. This is in the end more important than knowing via which body judges could influence governance. The conceptual map of judicial self-governance that follows includes 8 components: personal self-governance, administrative self-governance, financial self-governance, educational self-governance, information self-governance, ethical self-governance, digital self-governance, and regulatory self-governance. It is by no means an exhaustive list,[186]

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[181] I am grateful for this suggestion to Hubert Smekal and Nino Tsereteli.

[182] *See* Krenn, *supra* note 6; and Çalı & Cunningham, *supra* note 6.

[183] *See* Çalı & Cunningham, *supra* note 6.

[184] Note that the situation in the European Union is different from the Council of Europe in many aspects, as the European Commission and especially the European Parliament do play a role in shaping the CJEU, albeit by different means and less visibly than the domestic political branches. *See* Krenn, *supra* note 6; and Krenn, *supra* note 116.

[185] *Ibid*.

[186] One can also think of other dimensions such as media self-governance that would, among other things, include hiring spokespersons, handling social media, and having its own channels of medialization (such as TV channels, radio channels or own journals).

Table 1: Dimensions of judicial self-governance: a concept map.

JUDICIAL SELF-GOVERNANCE	Personal	selection of judges; promotion; disciplining; impeachment; relocation/reassignment; salaries and non-monetary benefits of judges
	Administrative	work schedules; composition of panels; initial case assignment; case reassignment; case load quotas; court performance evaluation; case flow; setting the number of judges per court; setting the number & the process of hiring law clerks; setting the number & the process of judicial personnel; transfer of jurisdiction; processing complaints
	Financial	setting of the budget of the judiciary; setting the budgets of individual courts; allocation of budget within courts; non-monetary support for courts (law clerks)
	Educational	training of judicial candidates; training of judges; organizing conferences; attending conferences; funding of further education; compulsory education
	Ethical	judicial ethics & codes of conduct
	Information	transparency mechanisms; recording trials; publishing judgments; financial disclosure; protection of personal data (GDPR implementation)
	Digital	administration of the files and judgments (data storage, clouds, servers); access to Internet; online search engines; e-justice
	Regulatory	rules of procedure; court statute

Source: author.

This conceptual map is by no means an exhaustive list of spheres of judicial self-governance,[187] but it could guide future research in this area in several ways. It could lead to a better understanding of where we stand regarding the scope of judicial self-governance in each jurisdiction. Later on, it would allow us to develop ideal types of judicial self-governance and the judicial self-governance index that would reflect changes over time.[188] It should also force us to rethink judicial self-governance in normative terms, as normative foundations for digital self-governance are quite different from normative foundations of personal or financial self-governance.

D. Rationales of Judicial Self-Governance

Judicial self-governance may be introduced, changed, and removed for several reasons. The ruling elites might want to entrench their influence within the judiciary. The key stakeholders may also believe that such solution will increase judicial independence, the accountability of judges, public confidence in the courts, the quality of justice, or the efficiency of the judicial system. Sometimes politicians might just want to get rid of cumbersome and time-consuming tasks that are below the radar of their political constituencies and the electorate. Or the rise and fall of judicial self-governance may be just a historical coincidence, a response to exogenous changes in the legal and political complex, the endeavor of a few influential individuals or transnational networks, the pressure from the European Union and the Council of Europe, a side-effect of a different reform project, or the result of an incremental drifting of power.

We need to know what the motivation behind the rise and fall of judicial self-governance is. If anything, it is necessary for the evaluation of the functioning of judicial self-governance bodies such as judicial councils and judicial appointments commissions. If we do not know why they were introduced and what was expected from them, we can hardly assess whether they met these expectations, in what they succeeded, and in what they failed. From a democratic perspective, we also need to hold these bodies to account, which is again a daunting task if we do not know for what they should be held to account and according to which standards. Finally, from a broader sociological perspective[189] we

[187] It merely reflects the contributions to this special issue. One can also think of other dimensions such as media self-governance that would, among other things, include hiring spokespersons, handling social media, and having its own channels of medialization (such as TV channels, radio channels or own journals).

[188] We have tried to develop such categorization and index regarding court presidents; *See* Blisa & Kosař, *supra* note 53.

[189] Interestingly, the sociology of professions has not rigorously studied judicial self-governance so far.

should be curious how such an important socio-legal phenomenon came into being and the driving force behind it.[190]

Unfortunately, the rationales of JSG have been undertheorized. To be sure, the growing scholarship on judicial councils has produced several theories such as the two-wave-theory of judicial councils, the external incentives theory of judicial councils, the transnational networks theory of judicial councils, and the dormancy of domestic parliaments in introducing judicial councils in CEE.[191] However, the existing theories are limited in several ways. First, they tend to apply only to judicial councils. Second, they are developed against the backdrop of experiences in Central and Eastern Europe, which has a peculiar historical and political trajectory. In contrast, judicial self-governance in Western Europe as well as at both European supranational courts has escaped theorizing so far. Third, the existing theories tend to treat the rise of judicial self-governance as a one-way path (with occasional bumps on the road) and overlook the possibility of counterreforms, pushback, backlash, and even rejection of judicial self-governance and the return to the previous "executive mode" of judicial governance. Fourth, these theories usually focus on why judicial self-governance is introduced, but less on why it is modified or even removed.

For instance, Daniela Piana has developed a "two-wave-theory" of judicial councils that builds on the distinction between the two waves of judicial reforms in Central and Eastern Europe: the "transition wave" that took place immediately after the democratic revolution (i.e. between 1989 and 1997), and the "pre-accession" wave that covered reforms adopted during the pre-accession period (i.e. between 1998 and 2006). Piana argues that those actors who emerged as winners from the first wave of reforms (the Ministry of Justice or the judicial council) were better placed in the second wave and exploited the opportunities provided by the European Union to entrench existing domestic allocations of power.[192] Other scholars have stressed the role of external incentives such as EU Accession conditionalities (external incentives theory of judicial councils), the role of the transnational "epistemic communities" of judges, scholars, and legal experts (transnational networks theory of judicial councils)[193] or the dormancy of domestic parliaments[194] in introducing judicial self-governance in Central and Eastern Europe.

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[190] See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814 (1987); and Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 433 (2012).

[191] *See* more below.

[192] Daniela Piana, *The Power Knocks at the Courts' Back Door – Two Waves of Postcommunist Judicial Reforms*, 42 COMPARATIVE POLITICAL STUDIES 816 (2009); or Piana, *supra* note 50, at 162–165.

[193] *See* Dallara & Piana, *supra* note 168.

Even if we limit our analysis to rationales of judicial councils in Central and Eastern Europe, we can see the limits of these predictive theories. Czechia actually defies all four theories. When we look at recent developments in Hungary and Poland, it is clear that there is a third wave, and the two-wave theory should be modified accordingly. Likewise, domestic parliaments are no longer dormant, and the role of external incentives for Central and Eastern European countries do not play as significant a role as originally thought.[195]

The case studies in this special issue do not provide any grand theories. They provide a more sober assessment of rationales of why judicial self-governance bodies came into being. In most countries the major rationale behind the introduction of new judicial self-governing bodies was to protect judicial independence and guarantee separation of powers.[196] Only in few countries, the establishment of major judicial self-governance bodies was motivated by improving other values such as judicial accountability or effectiveness of the judiciary.[197]

However, that does not mean that politics do not play a role in shaping JSG. On the contrary, virtually all case studies show that the foundations of judicial self-governance are political. In many countries, judicial councils were established in the wake of authoritarian[198] and totalitarian regimes.[199] Başak Çalı and Betül Durmuş show that the development of judicial self-governance in Turkey has also been a response to changing political conditions.[200] In Ireland, political crises also serve as the main driving force of judicial reforms touching upon judicial self-governance. The French and Italian case studies then show how judicial self-governance in these countries has been shaped by high-profile judicial scandals.[201] Even in the Netherlands, the establishment of the judicial council has

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[194] *See* Cristina E. Parau, *The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe*, 49 REPRESENTATION – JOURNAL OF REPRESENTATIVE DEMOCRACY 267 (2013).

[195] Or more precisely, these external incentives are of a short-term nature. Once the CEE country joins the EU, the incentives for CEE countries to *keep* judicial self-governing bodies meeting the EU standards are much weaker.

[196] This article cannot do justice to historical trajectories in all 14 jurisdictions. For a brief analysis *see* Table 1 in Urbániková & Šipulová, *supra* note 89.

[197] The Dutch judicial council is a rare example (*ibid*.).

[198] This is the case of the Spanish and Portuguese judicial councils.

[199] This is the case of the Italian judicial council and virtually all judicial councils in the post-communist countries in Central and Eastern Europe.

[200] Çalı & Durmuş, *supra* note 15.

been driven by political demands to improve the management of the Dutch courts and increasing the efficiency of the judiciary.

Politics was also behind the creation of the expert panels at the ECtHR and the CJEU, as both of them responded to the enlargement of the respective Court and to the need to screen newly arriving judges from Central and Eastern Europe.[202] Politics also help to explain the resistance to judicial councils in Germany and Czechia. On the basis of both case studies[203] one may of course argue that judicial councils are not needed, as there is enough judicial self-governance anyway.[204] However, in Czechia the rise of court presidents, the key judicial self-governance body, also has political roots. This results from the high turnover of Czech ministers of justice, the Ministry's personal misery, and the gradual overall demise of the influence and gravitas of the Ministry of Justice in the Czech political system. Germany's resistance to judicial councils is based on a peculiar understanding of the principles of democracy and separation of powers, which is deeply embedded among the traditional German political parties.[205] However, this might change in the near future for two interrelated reasons: the rise of new political parties[206] and the pressing need to be prepared to respond "to the kind of challenges Polish and Hungarian institutions have confronted in recent years".[207] The proposal by *die Linke* in 2013 to amend the Basic Law with a clause providing for judicial self-governance failed to attract sufficient support, but there are growing calls in Germany[208] as well as in other established

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[201] *See* Benvenuti & Paris, *supra* note 36; and Vauchez, *supra* note 35. *See* also Simone Benvenuti, *The Politics of Judicial Accountability in Italy: Shifting the Balance*, 14(2) EUROPEAN CONST. LAW R., 369–393 (2018)

[202] *See* Çalı & Cunningham, *supra* note 6; Bobek, *supra* note 58; and Mitchel de S-O-l'E Lasser, *Judicial Appointments, Judicial Independence and the European High Courts,* in THE TRANSFORMATION OR RECONSTITUTION OF EUROPE: THE CRITICAL LEGAL STUDIES PERSPECTIVE ON THE ROLE OF THE COURTS IN THE EUROPEAN UNION 121-150 (Tamara Perišin & Siniša Rodin eds., 2018).

[203] *See* Wittreck, *supra* note 45; and Blisa, Papoušková & Urbániková, *supra* note 42.

[204] *See supra* Part C.I.

[205] *See* Wittreck, *supra* note 45.

[206] The German judiciary has been afraid that with unknown political parties coming to power their independence might be in danger, and that might be the reason why some judges regard the concept of judicial self-government as tempting.

[207] Hailbronner, *supra* note 66.

[208] *Ibid*.

European democracies to conduct a "judicial stress test"[209] and entrench or even increase judicial self-governance.

That brings me to a related theme – it is not only the establishment of judicial self-governance bodies, but also their modification that is often driven by political determinants. Just think of the changing role of the presidency and the failed coup d'état in Turkey[210] and the rise of populist political leaders in Hungary[211] and Poland,[212] all of which were discussed above. In France, modifications of judicial self-governance responded to the judicial scandals in the early 2000s.[213] Similarly, the Italian parliament also reacted to the scandals within the judiciary. The same applies to Ireland, where a crisis of relations between judges and the political system and the resulting political row framed the debate regarding judicial self-governance. As O'Brien puts it, in order to understand judicial governance in Ireland and its reform, "getting the politics right is key".[214] This statement applies to all jurisdictions in this special issue.

Future research should acknowledge this dynamic and its repercussions. For instance, the case studies in this special issue show that the rise of judicial self-governance is not a one-way street and many countries have actually decreased judicial self-governance recently. More importantly, this happened not only in Hungary,[215] Poland,[216] and Turkey,[217] but also in France.[218] As a result, quite a few judicial councils do not meet the standards required by the international soft law on judicial governance, which is increasingly read into the European Convention on Human Rights by the ECtHR.[219] We also need to distinguish

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[209] Eirik Holmøyvik & Anne Sanders, *A Stress Test for Europe's Judiciaries*, VERFASSUNGSBLOG (Aug. 23, 2017), https://verfassungsblog.de/a-stress-test-for-europes-judiciaries/.

[210] *See* Çalı & Durmuş, *supra* note 15.

[211] *See* Kosař & Šipulová, *supra* note 20; and literature in *supra* notes 4, 65 and 105.

[212] *See* Śledzińska-Simon, *supra* note 7.

[213] *See* Vauchez, *supra* note 35.

[214] O'Brien, *supra* note 31. However, this might change, if the Irisih Parliament adopts the Judicial council Bill.

[215] *See* Kosař & Šipulová, *supra* note 20; and literature in *supra* notes 4, 65 and 105.

[216] *See* Śledzińska-Simon, *supra* note 7.

[217] *See* Çalı & Durmuş, *supra* note 15.

[218] *See* Vauchez, *supra* note 35.

[219] *See* Kosař & Lixinski, *supra* note 11.

between various forms of resistance to judicial self-governance. Here the conceptualization of resistance to international courts, which distinguishes between backlash, pushback, and withdrawal (exit), is particularly helpful.[220] While the French change of the composition of the *Conseil supérieur de la magistrature* in 2008 implies pushback,[221] the significant institutional reforms in Hungary (in 2011), Poland (in 2017), and Turkey (in 2017) qualify as a backlash against judicial self-governance.[222] And if Polish political leaders implement their threat to return to the Ministry of Justice model of judicial governance and abolish the National Council of the Judiciary altogether, such reform would fall into the category of exit from judicial self-governance. Finally, we also need to learn more about the reasons behind the fall of judicial self-governance in Central and Eastern Europe and the motivations of the politicians who executed it. A careful analysis of the Polish scenario by Anna Śledzińska-Simon is a promising start of this endeavor.[223]

E. Effects of Judicial Self-Governance

Analyzing the effects of judicial self-governance is a daunting task for at least three reasons. It is extremely difficult to isolate these effects from other social, political, economic, judicial, and historical factors even if one compares two countries that are closest to the natural experiment we can get.[224] Just think of the political turmoil in Poland and Romania or the changing role of the presidency in Turkey, all of which have had serious repercussions for their respective judicial councils. Sometimes even unique events such as the failed coup d'état in Turkey can make a difference.[225] In social science terminology, there are simply too many independent variables. Hence, do not expect any causal claims or predictive theories here. Second, even if we agree on the effects on *what* values we want to focus on, the dependent variables defy easy definitions. As the readers of this journal know very well, we are not even close to generally accepted definitions of key values such as judicial independence and judicial accountability, not to speak of

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[220] *See* Mikael Rask Madsen, Pola Cebulak & Micha Weibuch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14(2) INTERNATIONAL JOURNAL OF LAW IN CONTEXT 197 (2018).

[221] *See* Śledzińska-Simon, *supra* note 7; Çalı & Durmuş, *supra* note 15; and Kosař & Šipulová, *supra* note 20.

[222] *See* Śledzińska-Simon, *supra* note 7; Çalı & Durmuş, *supra* note 15; and Kosař & Šipulová, *supra* note 20.

[223] Śledzińska-Simon, *supra* note 7.

[224] *See* Kosař, *supra* note 52 (comparing the impact of judicial council in Slovakia on judicial accountability with the functioning of the Czech ministry of justice model of court administration).

[225] Çalı & Durmuş, *supra* note 15.

confidence in and transparency and legitimacy of the judiciary. Third, many values are actually interdependent and thus cannot be easily disentangled.

An article on the impact of the establishment of the judicial council on public confidence in courts exemplifies all these issue. Marína Urbániková and Katarína Šipulová grapple with the conceptual disagreement regarding public confidence and define its three levels (individual, institutional and cultural), painstakingly identify the factors that may influence public confidence in the judiciary, and acknowledge that the establishment and reforms of judicial councils usually relate public confidence to some other value: most frequently these are independence (Netherlands, Poland, Italy, Hungary, Ireland), accountability (Netherlands), and the perception of the effectiveness of the judicial system (Netherlands, Poland, Hungary, France, Ireland).[226] Only then can they study the effects of judicial councils on public confidence.

They are careful not to make any causal claims, but their findings provide a lot of food for thought as they show that the EU countries without judicial councils are in general better off in terms of public confidence. More specifically, they conclude that the existence of judicial councils does not make a difference regarding public confidence in the judiciary in the new EU member states, while in the old EU member states judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them.[227] In other words, the ability of judicial councils to enhance confidence in courts is limited. This does not necessarily mean that the existence of a judicial council is to be blamed for lower public confidence. They merely argue that judicial councils have only limited power to deal with the structural causes of low public confidence in courts, which often has deeper cultural and societal roots

Marína Urbániková and Katarína Šipulová also summarize the impact of judicial councils on judicial independence, which is closely related to public confidence in courts.[228] In Romania, according Selejan-Guțan, the judicial council *"was not sufficient for protecting the true independence of the judiciary"*.[229] Regarding Slovenia, Matej Avbelj concludes that the judicial council has had a limited impact on independence, and there have even been cases in which its (in)action negatively affected it.[230] Slovakia serves as a cautionary tale regarding the impact of the establishment of the judicial council on judicial independence.

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[226] *See* Šipulová & Urbániková, *supra* note 89.

[227] *Ibid*.

[228] *Ibid*.

[229] Selejan-Guțan, *supra* note 14.

[230] Avbelj, *supra* note 41.

While the Judicial Council of the Slovak Republic arguably increased the institutional independence of the judiciary, it failed to secure the independence of individual judges.[231] In fact, Slovak judges faced more reprisals from their colleagues who captured the judicial council than from the Minister of Justice before the introduction of the judicial council.[232]

Judicial councils in Spain and Turkey also failed to deliver judicial independence. Aida Torres Pérez argues that in Spain the judicial council has been captured by politicians, which in turn prevents it *"from fulfilling its goal and has contributed to undermining public confidence in the judiciary as a whole"*.[233] This in line with the empirical data that show that a shocking 36 % of Spanish judges think that the Spanish *Consejo General del Poder Judicial* disrespect their independence.[234] In Turkey, according to Çalı and Durmuş, it has been *"suspect, whether the different forms of JSG have promoted judicial independence, given the highly politicized conditions that led to many of the JSG reforms".*[235]

Judicial councils in France, Italy, and Poland show mixed results. Although they helped to secure independence, other problems arose. Vauchez concludes that even though the judicial council in France *"has undoubtedly gained competences and institutional autonomy, it remains firmly embedded in a dense web of links and dependences that secure its integration within the body of the State".*[236] Similarly, Benvenuti and Paris claim that in Italy the High Council of the Judiciary played a crucial role in securing the independence of the judiciary from the executive power, but this does not apply to internal independence.[237] Finally, the Polish case is a sad story. Śledzińska-Simon shows that the Polish Judicial Council in general succeeded as a guarantor of independence, but it did not prevent the Law and Justice regime from pushing through its 2017 judicial reform, which allowed it to pack the judicial council with its protégés and turn it against "recalcitrant" judges.[238]

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[231] Spáč, Šipulová & Urbániková, *supra* note 31.

[232] *Ibid*. *See* also Kosař, *supra* note 52

[233] Torres Pérez, *supra* note 39.

[234] *See* e.g. Castillo Ortiz, *supra* note 52, at 317 and 327-328.

[235] Çalı & Durmuş, *supra* note 15.

[236] Vauchez, *supra* note 35.

[237] Benvenuti & Paris, *supra* note 36.

[238] Śledzińska-Simon, *supra* note 7.

In countries without judicial councils or the court service, this assessment is also complex. Fabian Wittreck shows that German ministers rarely endangered individual judicial independence, while judicial self-government bodies, such as presidia and court presidents, have in some cases infringed the rights of individual judges.[239] According to him, "[t]*he mechanisms of* [judicial] *self-government merely shift the dangers for individual judicial independence by shifting power*".[240] At the moment, the major danger in Germany lies in promotion of judges.[241] In Czechia court presidents evolved into guardians against executive interferences with judicial independence, but due to the absence of sufficient safeguards they also present a threat to the independence of rank-and-file judges.[242] The "buffer" between court presidents and rank-and-file judges, which in Germany is represented in particular by presidia and service courts, simply does not exist in Czechia.

We know much less about the impact of judicial self-governance on other values. Regarding legitimacy, strong judicial self-governance bodies insulated from the elected branches of government inevitably reduce the democratic legitimacy of the judiciary.[243] However, legitimacy of the judiciary has its legal and social dimensions,[244] which should be studied in more detail in future.[245] Legitimacy warrants attention on its own, especially at the supranational level, since legitimacy was one of the principal reasons used to justify the judicial self-governance reforms at the ECtHR, particularly with regard to judicial selection.[246]

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[239] *See* Wittreck, *supra* note 45.

[240] *Ibid*.

[241] *Ibid*.

[242] *See* Blisa, Papoušková & Urbániková, *supra* note 42.

[243] *See* Wittreck, *supra* note 45.

[244] *See* e.g. Peter G. Stillman, *The Concept of Legitimacy*, 7(1) POLITY 32–56 (1974); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20(3) THE ACADEMY OF MANAGEMENT REVIEW 571–610 (1995); and Ian Hurd, *Legitimacy and Authority in International Politics*, 53(2) INTERNATIONAL ORGANIZATION 379–408 (1999).

[245] *See* e.g. James L. Gibson, Gregory A. Caldiera & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92(2) THE AMERICAN POLITICAL SCIENCE REVIEW 343–358 (1998); Sidney W. Richards, *Survey article: the legitimacy of Supreme Courts in the context of globalization*, 4(3) UTRECHT LAW REVIEW 104–127 (2008); Yuval Shany, *Assessing the Effectiveness of International Courts: A goal-based approach*, 106(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 225–270 (2012); Başak Çalı, Anne Koch & Nicola Bruch, *The Legitimacy of Human Rights Courts, A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35(4) HUMAN RIGHTS QUARTERLY 955–984 (2013).

[246] *See* Çalı & Cunningham, *supra* note 6.

Information about the impact of judicial self-governance bodies on judicial accountability is also scarce, and thus it is difficult to deduce a clear pattern. This is again partly due to the significant disagreement among European scholars, judges, and policymakers regarding the concept of judicial accountability itself.[247] With this huge caveat in mind, we can still see that the majority of contributions do not support the view that judicial self-governance bodies increase judicial accountability. Some case studies suggest the contrary. Regarding Italy, Benvenuti and Paris conclude that in contrast to securing the independence of the judiciary, "*the Italian model of JSG has been far less effective in making the judiciary accountable*."[248] Other contributions claim that judicial self-governance did not change the current levels of judicial accountability. For instance, Patrick O'Brien suggests that in Ireland "*lines of accountability for the* [Court] *Service through the Minister for Justice and the parliamentary committee system remained intact.*"[249] Slovakia then serves as a cautionary tale since the Slovak judicial elite, and especially Chief Justice Harabin, abused accountability mechanisms in order to reward his allies (through salary bonuses and promotion) and to punish their critics (via disciplinary motions).[250]

The assessment of the impact of judicial self-governance on accountability is even more difficult at the supranational level. Christoph Krenn argues that the individual accountability of CJEU members is regulated in-house, while the institutional accountability is secured primarily by the European Parliament through the EU's budgetary process.[251] Accountability is even more limited at the Strasbourg Court, on both the institutional and individual levels.[252] In sum, judicial self-governance practices at the ECtHR

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[247] *See* Samuel Spáč and David Kosař, *Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back*, 9(3) INTERNATIONAL JOURNAL OF COURT ADMINISTRATION (2018 forthcoming); and other contributions to this special issue that discusses the ENCJ's method of assessment of judicial independence and accountability. *See* also Kosař, *supra* note 52; and Benvenuti, *supra* note 201.

[248] Benvenuti & Paris, *supra* note 36.

[249] O'Brien, *supra* note 31. However, this might change, if the Irisih Parliament adopts the Judicial council Bill.

[250] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[251] In detail, Krenn, *supra* note 116.

[252] *See* Çalı & Cunningham, *supra* note 6.

clearly prioritize judicial independence at the expense of accountability,[253] which fully accords with the institutional setup and the "judicial trilemma" theory of the ECtHR.[254]

Finally, regarding the impact of judicial self-governance on the transparency of the judiciary, case studies in this special issue provide much richer information.[255] Here, some judicial self-governance bodies fare particularly well. In Spain, "*the Council has labored to provide the public with broad, easily available information and promote increased transparency regarding judicial activities*", including a special Website on Transparency.[256] Regarding Ireland, O'Brien argues that the Courts Service "*ha*[s] *increased the transparency of the courts system through the Courts Service website and annual reports. It is possible that these changes have played a small role in enhancing public trust and improving the legitimacy of judges and the courts.*"[257] In Slovakia, the establishment of the Judicial Council of the Slovak Republic in 2003 led to a major improvement in the transparency of the Slovak judiciary, but the key transparency reform was adopted by the Slovak parliament in 2011, among other things, due to the opaque decision-making processes at the Judicial Council of the Slovak Republic.[258] Hence, judicial councils can improve transparency both directly and indirectly, and sometimes even their negative view of judicial transparency may prompt legislative reform.

In contrast, Fabian Wittreck argues that "*mechanisms of self-government have only a marginal effect on the (lacking) transparency of the* [German] *judiciary*", because their outputs are too technical.[259] This suggests that in studying transparency we should care not only about the accessibility of data about the judiciary and their findability (how easily these data can be located), but also about their understandability (e.g. their user-friendly format). Future research on judicial transparency should inquire into "the degree to which

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[253] But note that according to Çalı & Cunningham, individual ECtHR's judges can be held accountable by way of naming and shaming tactics undertaken by external actors, for example, NGOs, commentators on Strasbourg jurisprudence, domestic supreme courts, parliaments and the executive. *See* Çalı & Cunningham, *supra* note 6.

[254] *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 713–760 (2017).

[255] *See* also Solomon, *supra* note 52.

[256] *See* Torres Pérez, *supra* note 39.

[257] O'Brien, *supra* note 31.

[258] *See* Spáč, Šipulová & Urbániková, *supra* note 31.

[259] *See* Wittreck, *supra* note 45.

desirable (recorded) information about the judiciary is (perceived to be) made available, findable and understandable".[260]

Both contributions on transnational courts also raise interesting insights regarding judicial transparency. Regarding the ECtHR, Başak Çalı and Stewart Cunningham challenge the picture of ECtHR's wide transparency painted by the "judicial trilemma" theory of transnational courts.[261] According to them, when considered in light of the totality of judicial self-governance practices at the Strasbourg Court, they find that the effect of judicial self-governance in promoting transparency is more complex. More specifically, they argue while the output of Strasbourg judges is highly transparent information on how they work behind the scenes is much less clear.[262]

Finally, the Netherlands and Ireland provide optimistic insights regarding the impact on the *effectiveness* of the judiciary. It seems that in both countries, the judicial council[263] (the Netherlands) and the Court Service (Ireland) were established primarily to improve the management of the courts, and they were not expected to become the guarantors of judicial independence, also because in both countries the judiciary has traditionally enjoyed a high level of independence. Both O'Brien and Mak argue that this promise has been fulfilled. Regarding Ireland, O'Brien argues that *"the creation of the Courts Service has allowed the judiciary to improve the public image of the courts through improved facilities."*[264] Mak concludes that "*judicial self-government in the Netherlands can be assessed as functioning adequately"* on the basis of a combination of rule-of-law values and new public management values (effectiveness, efficiency, and a client-oriented system).[265] However, experience from these two countries also shows that there is a certain trade-off between the efficiency of courts and judicial independence. In particular in the Netherlands, the establishment and functioning of the judicial council led to

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[260] In developing this definition I build heavily on Jenny De Fine Licht, Daniel Naurin, Peter Esaiasson & Mikael Gilljam, *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, 27(1) GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS 111–134 (2014); and Greg Michener & Katherine Bersch, *Identifying Transparency*, 18 INFORMATION POLITY 233–242 (2013).

[261] *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 713–760 (2017).

[262] *See* Çalı & Cunningham, *supra* note 47.

[263] But note that the Dutch judicial council, despite its nominal name, is actually very close to the Irish Court Service model. *See supra* note 79.

[264] O'Brien, *supra* note 31.

[265] Mak, *supra* note 37.

concerns that the new public management approach might encroach upon judicial independence at risk[266] and it took a while to find a proper balance.

In sum, the case studies in this special issue provide a lot of food for thought regarding the effects of judicial councils. Three insights emerge clearly. First, regarding the impact of judicial self-governance on judicial independence and accountability it is crucial to distinguish between the institutional and individual levels. Several case studies actually argue that the introduction of judicial self-governance increased the institutional *independence* of the judiciary, but did not improve or even negatively affected the independence of individual *judges*.[267] The same problem arises *mutatis mutandis* regarding the impact on accountability of the judiciary on the one hand and the accountability of judges on the other. Second, judicial councils failed to deliver in Central and Eastern Europe. In fact, case studies on Poland, Slovakia, and Slovenia show that they fare much worse than suggested by earlier research, which focused on the perception of independence by judges in these countries.[268] The major difference is that in Poland this is due to exogenous factors, while in Slovakia and Slovenia the explanation is primarily endogenous. The only contribution from Central and Eastern Europe which views the impact of judicial councils positively is Bianca Selejan-Guțan's assessment of the Romanian Superior Council of Magistracy. But even she identified many negative effects such as lack of transparency and minimal accountability and argues merely that the judicial council model is a "lesser evil".[269] Third, judicial councils as well as many other judicial self-governance bodies, in general, seem to be better at enhancing transparency and effectiveness[270] rather than judicial independence, judicial accountability, and public confidence. This goes against much of the existing scholarship, which focuses primarily on the impact of these bodies on judicial independence and judicial accountability.[271]

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[266] For instance, some judges did not feel represented by the Council, objected to the temporary appointment procedure for new court presidents, and claimed that the assessment of judicial performance had come to emphasize output too much. For further details see *ibid*.

[267] On how impotant the distinction between these two levels is *see also* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

[268] *See* e.g. Castillo Ortiz, *supra* note 52 (suggesting that there is only moderate perception of disrespect of judicial independence in Slovakia and Slovenia and that there is low perception of disrespect of judicial independence in Poland).

[269] *See* Selejan-Guțan, *supra* note 14.

[270] But note that analysis of the determinants of judicial performance based on data provided by the European Commission for the Efficiency of Justice (CEPEJ) conducted by Voigt and El Bialy suggested that judicial councils were consistently correlated with a worse, rather than a better performance. *See* Stefan Voigt & Nora El-Bialy, *Identifying the determinants of aggregate judicial performance: taxpayers' money well spent?*, 41(2) EUROPEAN JOURNAL OF LAW AND ECONOMICS 283-319 (2016).

[271] *See* the literature in *supra* notes 50 and 52.

In future research, these insights should ideally be combined with rigorous empirical testing based on the well-defined indicators.[272] The reconstructive legal method applied by most contributions to this special issue has a lot to learn from the growing empirical research on judicial councils, and vice versa. These two groups of scholars have the same aim in the end – to get closer to the truth. They just tackle the same issue from a different angle.

F. Conclusion

Judicial self-governance has a long tradition in several European countries,[273] but it has increased significantly during the 1990s and the 2000s, especially due to the rise of judicial councils (broadly understood) in Central and Eastern Europe. However, in the same period judicial self-governance, albeit in different forms, has also gradually expanded in Western European countries as well as at the ECtHR and the CJEU. This has allowed us to see how different forms of judicial self-governance work in different environments and theorize about them.

This special issue takes stock of the forms, rationales, and effects of judicial self-governance in Europe. It has shown that judicial self-governance is a much broader phenomenon than judicial councils and may also take different forms. It has also questioned several assumptions about the effects of judicial councils and other judicial self-governance bodies. Most importantly, it exposed the liquid nature of judicial self-governance and its embeddedness in the political, social, cultural, and social context.[274] In contrast to the standard picture, in most European states the implementation of judicial self-governance has been non-linear and responded to political and social changes.

Each judicial self-governance body simply has to protect its turf against the political actors as well as against judges and other judicial self-governance bodies. If it fails, it may be

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[272] *See* e.g. Castillo Ortiz, *supra* note 52; Stefan Voigt, Jerg Gutmann & Lars P. Feld, *Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators*, 38 EUROPEAN JOURNAL OF POLITICAL ECONOMY 197–211 (2015); Jerg Gutmann & Stefan Voigt, *Judicial independence in the EU: a puzzle*, EUROPEAN JOURNAL OF LAW AND ECONOMICS 1-18 (2018); and ANDREAS LIENHARD & DANIEL KETTIGER, THE JUDICIARY BETWEEN MANAGEMENT AND THE RULE OF LAW: RESULTS OF THE RESEARCH PROJECT BASIC RESEARCH INTO COURT MANAGEMENT IN SWITZERLAND (2016).

[273] This is the case of Italy, Romania and partly also France. *See* Benvenuti & Paris, *supra* note 36; Selejan-Guțan, *supra* note 14; and Vauchez, *supra* note 35.

[274] This is in line with empirical findings that conclude that cultural traits are of fundamental importance for judicial independence and the quality of formal institutions more generally. *See* Gutmann & Voigt, *supra* note 272.

captured by political forces,[275] abused by judicial elites,[276] or become inconsequential.[277] If it succeeds, it may improve the efficiency and transparency of the judiciary,[278] and in the long term perhaps also public confidence in courts, judicial independence, and judicial accountability. All contributions to this special issue acknowledge this dynamic and openly address political contestations regarding judicial self-governance. It is up to future research to build on their insights and analyze under what circumstances judicial self-governance delivers the results we expect from them.

[275] *See* Spanish judicial council (analyzed in Torres Pérez, supra note 39).

[276] *See* Slovak judicial council (analyzed in Spáč, Šipulová & Urbániková, *supra* note 31).

[277] *See* the Hungarian judicial council (analyzed in note 105).

[278] *See* especially the Dutch judicial council (analyzed in Mak, *supra* note 37) and the Irish Court Service (analyzed in O'Brien, *supra* note 31).

Articles

The Strange Non-Death of Statism: Tracing the Ever Protracted Rise of Judicial Self-Government in France

Antoine Vauchez[*]

Abstract

The article explores the "strange non-death" of the French statist tradition in matters regarding the judiciary. It traces the formation of the specific French model of government of the judiciary describing the stronghold established by the duopole of the Cour de cassation and the ministry of justice's bureaucracy (the so-called Chancellerie) over time (1810–1993) and the failed attempt of the IVth Republic (1946-1958) to unsettle this power balance. It then considers the new context that emerged in the 1990s and analyzes successive reforms that have tried to undermine this deep-seated tradition. In the last part, the article provides an overall assessment of the impact of these reforms on the independence, accountability, and legitimacy of the French judiciary.

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Analyzing the historical trajectory of "judicial self-government" in France (or lack thereof…) calls for a preliminary reflection on the very notion of government or self-government as applied to the judiciary. While the word is routinely used in Italia (autogoverno), in Spanish (autogobierno) or in English, it remains very rare in French. Perhaps unsurprisingly in a country where the fear of the "gouvernement des juges" has haunted the political imaginary for more than two centuries, legal scholars and judges have always preferred the more modest and neutral notion of "administration de la justice".[1] For the purpose of this research, we would like to depart from this tradition. While the notion of "government of the judiciary" (hereafter GOJ) may seem politically loaded when understood in strict institutional terms, it proves particularly heuristic when given a broader meaning that goes beyond the Conseil supérieur de la magistrature. The notion of government allows for an expansion of the analysis in three directions: first, the broad social, professional and political constellation of actors (high magistrates, judges' unions, politicians, bureaucrats of the ministry of justice, etc.) that get involved and compete over the definition of principles, rules and institutions that (should) govern French judicial profession; second, the various institutional sites where this discussion is unfolding from the parliamentary assemblies to the Cour de cassation or the various administrative departments of the ministry of justice (cabinet, direction du personnel, commissions d'avancement, the Ecole nationale de la magistrature, etc.), the legal scholarship (doctrine) and, last but not least, the Conseil supérieur de la magistrature. Third, the variegated set of instruments through which judges are governed: recruitment, professional careers, vocational training, mobilities outside the profession, disciplinary rules, standards of ethical conduct, etc…

In order to appraise the specific French way of "government of the judiciary" and its transformations over time, one needs to craft a preliminary analytical framework. Admittedly, each form of GOJ embodies a specific assemblage of two essential forms of legitimacy: internal and external. The "internal" form of legitimacy refers to the relative role of statute (hierarchy) or election (unions) as credentials to represent and speak in the name of the judicial profession; the "external" form of legitimacy is a more complex matter as it connects to different possible conceptions of democracy and separation of powers, ranging traditions of direct dependence towards the executive branch (whether it is the ministry of justice or the president of the Republic) to connections with parliamentary assemblies and, to some extent, citizens.[2] Ever since the late XIXth century, when the judiciary was recognized forms of functional autonomy, all forms of GOJ in Western democracies provide a combination of these two types of legitimacy. Just as there

[1] See for example: THIERRY RENOUX & A. ROUX, L'ADMINISTRATION DE LA JUSTICE EN FRANCE, QUE SAIS-JE ? (1994).

[2] Any research that attempts to present French judicial government to an English-speaking audience is faced many historical idiosyncracies and "intraduisibles". This requires to clarify the lexicon from the very beginning: "magistrats" and "magistrature" (hereafter: magistrates and the judiciary) refer to the common statute of those who have been recruited through the concours and trained at the "Ecole nationale de la magistrature". They include both the "magistrats du siege" (hereafter: sitting judges) and "magistrats du parquet" (hereafter: prosecutors).

are no GOJ exclusively grounded on judicial "self-government", there is no system of pure bureaucratic or governmental ruling. As a result, each form of GOJ strikes a particular balance in-between "an unacceptable judicial subordination to politics and an equally unacceptable corporatist ruling" to put it like Paul Coste-Floret, special rapporteur of the constitutional law project on the Conseil supérieur de la magistrature (CSM) in the Constitutional Assembly 1946. This particular combination can be tracked in the composition of the bodies in charge of defining norms and procedures for the judicial profession (eg Conseil supérieur de la magistrature) as well as in the distribution of power regarding disciplinary procedures and the control over professional careers.

The following table sketches, in an ideal-typical manner, various possible combinations of internal and external forms of legitimacy. It allows to delineate four ideal-types. The "Duopole" mode of government refers to a situation, frequent in judiciaries of Napoleonic descent, where the judicial profession is jointly governed by senior magistrates (heads of courts, members of the Cour de cassation) and high civil servants from the Chancellerie (French ministry of justice). The "Popular" ideal-type, most common in parliamentary regimes before the emergence of judicial unionism, is featured by a strong connection of GOJ to parliamentary sovereignty as protection of judges' independence from bureaucracy. The "Democratic" form of GOJ, best embodied by the Italian Consiglio Superiore della Magistratura ever since the 1970s,[3] is mostly organized around the actors of representative democracies, namely parties and unions. Last but not least, the "Corporatist" way of governing the judiciary refers to the combination of a strong unionism and a powerful bureaucratic power. None of these ideal-types are to be understood as mirroring reality. Rather they form theoretical fictions that prove useful when it comes to analyze differences across historical configurations.

[3] DANIELA PIANA & ANTOINE VAUCHEZ, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA (2012).

Table 1: Governing the Judiciary. A Conceptual Map

External Legitimacy: / Internal Legitimacy:	**Executive** Ministry of justice Bureaucracy	**Popular** Parliament Citizens
Hierarchical Cour de cassation courts' presidents	*"Duopole"* *Bureaucratic-Hierarchical* 1958-1993	*Political* IVth Republic
Elective Unions	*Corporatist*	*Democratic*

With this conceptual map in mind, the paper explores how the French way of GOJ has transformed moving across the different boxes of the table. On both the "internal" and the "external" axis of legitimacy, one should not underestimate the epochal transformation underwent by French judiciary. Starting with the first CSM in 1883, it has seen the rise of judicial professionalism leading to the progressive recognition of a role for judges' associations (and later on) unions and lower rank magistrates therein. Initially limited to the judging in the disciplinary system, the scope of self-government have moved progressively to a co-management of professional careers by the CSM and the ministry of justice. Likewise, the paper tracks the transformations of "external legitimacy". The perception of the judiciary has indeed changed dramatically in French public space – in particular from the 1990s onwards. In the context of increasing public distrust in the partisan politics, the judiciary has come to be viewed by many groups as an autonomous institution in-between the State and civil society, with a political legitimacy of its own. As political interferences on judicial affairs were put under the public eye, a variety of governments have attempted to reform the GOJ: in 1993 and in 2008, two substantial constitutional reforms of the Conseil supérieur de la magistrature have been adopted – while a number of others, in particular in 1998 and more recently in 2013 have failed, thereby pointing at a state of permanent unrest on the subject matter. As a result, the position of the CSM in the French field of power has changed substantially over time. While it was born in 1883 with very limited power (decisionary power in disciplinary matters) under the umbrella of the Cour de cassation, the Conseil has progressively gained

jurisdiction over the careers of sitting judges and now – although in part only – over the prosecutors.

However, the paper also points at the fact that the GOJ displays an important level of historical continuity in France. The bureaucratic/hierarchical model of Napoleonic descent that conceives of the judiciary as just one specialized authority under the umbrella of the State has deep professional and institutional roots.[4] This system of government based on a duopole of the ministry of the justice and the Cour de cassation has perpetuated in spite of the nine changes in political regime that occurred in-between 1810 (when the first statute of the judiciary was adopted) and 1958 (when the Vth Republic was installed). While many social, professional, institutional changes have occurred ever since, none has fully managed to reorient the course of this historical trajectory. Despite many attempts, the Conseil supérieur de la magistrature has never become a full-fledged Council of the "judicial power" (Conseil supérieur de la justice) and there are many elements that indicate the continuous power of the executive branch over the government of the judiciary, in particular (but not only) when it comes to prosecutors. By the many standards, French GOJ is best understood as a co-production of both the CSM and the ministry of justice who form two essential (and competing) junctions between the judicial, the bureaucratic and the political fields.

The article is divided in three parts. First, it explores the formation of French historical tradition of GOJ describing the stronghold established by the duopole of the Cour de cassation and the ministry of justice's bureaucracy (the so-called Chancellerie) over time (1810–1993) and the failed attempt of the IVth Republic (1946-1958) to unsettle this power balance. Second, it considers the new context that emerges with the 1990s and analyzes the succession of reforms that have tried to undermine this deep-seated tradition. In the last part, the article provides an overall assessment of the impact of these reforms on the independence, accountability and legitimacy of the French judiciary.

A. The Duopole Form of Government. From Genesis to (Partial) Crisis (1810-1993)

If one is to understand the conditions of emergence of French specific way of judicial self-government, he/she has to start with a historical détour into the formation of France's post-revolutionary State. The important 20th April 1810 bill on the organization of the judiciary (loi relative à l'organisation de l'ordre judiciaire et l'administration de la justice) broke with the revolutionary promise that judicial offices, just like any other public office, would become elective, a principle written down "without discussion and unanimously" in the 1790 Constitution ("les juges seront élus par le peuple").[5] Fully inserting the judiciary

[4] On the strongly rooted professional *habitus* of administrative and political loyalty within the judiciary, *see* ALAIN BANCAUD, UNE EXCEPTION ORDINAIRE. LA MAGISTRATURE FRANÇAISE EN FRANCE 1930-1950 (2002).

[5] While the principle has long constituted an authentic act of Republican faith was reactivated in 1848 and then again in 1870 with the IIIrd Republic, and inspired a variety of non-professional tribunals (starting with the cour

into the centralized administrative order that was progressively emerging during the Napoleonic era, the bill turned the judiciary into a bureaucratic body put under the direct control of the executive power.[6] Reinforced by the various waves of épuration of the higher ranks of the judiciary that has accompanied each regime change across the XIXth century, a structural subordination of judicial activity to the executive power was maintained over time. A duopole progressively emerged that staged the Cour de cassation and the ministry of justice as the two pillars of the government of the judiciary. Critical in this connection was the Parisian fraction of the judiciary that occupied positions alternatively at the ministry of justice (hereafter Chancellerie) and in higher judicial offices –from the Cour de cassation to the courts of appeal, whose access was highly dependent on political connections. Alain Bancaud who has devoted two important volumes to the historical subordination of French judiciary to both politicians and top bureaucrats, has provided the most documented description of the resilience of the power structure that initially coalesced under Napoleonic rule.[7]

I. Limiting the Rise of Corporatism

While the IIIrd Republic (1870–1940) initially re-activated the revolutionary act of faith in elected judges, symbolically voting a bill in 1883 that called for the enactment of such principle, it soon took on the same path dependency. Truly enough, the IIIrd Republic did allow for the emergence of forms of judicial corporatism. With the advent of the Republic, newer and lower fractions of the bourgeoisie and the then emerging middle class (the so-called "nouvelles couches sociales" coined by Republican leader Léon Gambetta) entered the judicial body.[8] Contrary the long dominant profile of local notables that had populated the judiciary all over the XIXth century, the new generations were therefore much more dependent on and wary of "promotion rules" (career stability, professional criteria) and involved in the defense of their professional interests within the State. Following the creation of the first of association of magistrates at the turn of the century, the lineaments of a "public concours" at the entry to the profession were set up in 1906 limiting the access to the judicial profession to those who had received a law degree (the so-called "décret Sarrien", 18th August 1906). This elevation of the threshold weakened the share of heredity that had been so strong in the judiciary all along the XIXth century (the so-called

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d'assises), it never became central in French judiciary: FRANÇOISE LOMBARD, LES JURÉS. JUSTICE REPRESENTATIVE ET REPRESENTATIONS DE LA JUSTICE (1993); L'ELECTION DES JUGES. ESSAI DE BILAN HISTORIQUE FRANÇAIS ET CONTEMPORAIN (Jacques Krynen ed., 1999).

[6] Cf. BENOIT GARNOT, HISTOIRE DE LA JUSTICE (2009); JEAN-PIERRE ROYER, JEAN-PAUL JEAN, HISTOIRE DE LA JUSTICE DU XVIIEME SIECLE A NOS JOURS (2010).

[7] Bancaud, *supra* note 4.

[8] Christophe Charle, *État et magistrats, les origines d'une crise prolongée*, 96-97 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 39 (1993).

"noblesse de robe"),[9] distancing the judicial body from the traditional profile of "a notable, souvent rural, amateur éclairé, recherchant dans les fonctions judiciaires l'autorité et la légitimité d'un poste valorisé plus qu'un revenu".[10]

Yet, this initial movement of professionalization occurred under strict governmental rule. As a matter of fact, the creation of the "concours public" did not undermine the political loyalty of the new recruits.[11] From the Preliminary Inquiry (Enquête préalable authorizing the candidate to participate to the concours) which involved an assessment of the candidate's political loyalty to the control of the composition of the jury, a variety of mechanisms allowed the executive power to maintain a stronghold over the recruitment of judges. Truly enough, an embryo of self-government did develop in parallel. In 1883, a very first protection was granted to sitting judges with the creation of a new "chamber" of the Cour de cassation, the so-called Conseil supérieur de la magistrature, made of all members of the supreme court, that was in charge of the disciplinary power. Ironically, this first element of self-government was part of a larger bill (loi Martin-Feuillée on judicial organization, 30th August 1883) that suspended for three months the principle of immovability of sitting judges, thereby allowing the Republican government to engage the largest purge of the century with more than 1.000 magistrates leaving the profession.

While an embryo of self-government was recognized, it was under the strict condition that it would remain contained (the CSM only had power in disciplinary matters, leaving the control of professional careers to the other administrative bodies), limited (the newly-created CSM had no say over parquet magistrates), and purely reactive (the CSM could not open a disciplinary case).[12] The management of sitting judges' careers was also reformed with the creation in 1906 of the commission de classement headed by the two highest magistrates (President de la Cour de cassation and Chief prosecutor at the Cour de cassation). However, the composition and the competences of the commission were changed many times, in particular in 1908, as a way to secure that the role of the Chancellerie would not be weakened in consequence. Moreover, given the leading role of Cour de cassation and of the Chancellerie in both the commission d'avancement and the CSM, the "Parisian bloc" described by historian Alain Bancaud kept its stronghold. All in all, while the IIIrd Republic did allow for the emergence of forms of corporatism and supported the rise of a professionalism within the judiciary, it certainly never managed to

[9] *Id.* at 9, 39–48.

[10] VIOLAINE ROUSSEL, AFFAIRES DE JUGES. LES MAGISTRATS DANS LES SCANDALES POLITIQUES EN FRANCE (2002).

[11] On the history of "concours", *see* CATHERINE FILLON, MARC BONINCHI, DEVENIR JUGE 60-1 (2008).

[12] It should be added that the principle of immovability that had been granted to sitting judges in 1883 did not concern the "magistrature coloniale" who were put on the direct disciplinary jurisdiction of the local "Gouverneur" and of the Prosecution Office (*Parquet*): see Jean-Paul Jean, *Le statut du magistrat de l'entre-deux-guerres à 1958*, CAHIERS DE LA JUSTICE (2018).

upset the traditional symbiotic relationship between the Cour de cassation and the Chancellerie in the government of the judicial body.

II. Containing Political Ruptures: the Rise and Fall of the IVth Republic Conseil supérieur de la magistrature

In the long history of the duopole form of government, the IVth Republic (1946–1958) could have marked a sharp rupture.[13] The 1946 Constitution was a spectacular change of statute for the CSM, echoing in an interesting way transformations that were occurring simultaneously in Italy in the framework of the Assemblea costituente.[14] By many standards, the CSM was one of the main (if not the main) innovation of the IVth Republic Constitution together with the formal recognition of judges' immovability as a constitutional principle. A whole title of the Constitution ("Titre IX. Du Conseil supérieur de la magistrature") was actually devoted to the CSM that described its new role and competences. Not only was the CSM elevated to the statute of constitutional organ but it was also placed directly under the heading of the president of the Republic –himself brought up to a role of "garant de l'indépendance judiciaire". To be sure, there were elements of continuity with the previous system. Prosecutors were kept out of this transformation remaining strictly under the hierarchical-bureaucratic umbrella of the Chancellerie; and the ministry of justice maintained its "monopoly of proposals" over nominations of sitting judges. Yet, the 1946 Constitution did mark an attempt to undermine the duopole government of the judiciary. For the first time, the CSM moved beyond the realm of disciplinary powers and was granted a decisional power over sitting judges' career, thereby depriving the ministry of justice from a key element of its traditional competences. In addition, Article 84 explicitly granted to the CSM the administration of tribunals and the protection of independence.[15] The nomination of the Conseil also indicated a sharp rupture with the past: part of the members were elected by the magistrates themselves thereby depriving the Cour de cassation of its monopoly of representation of the judicial body; the other members were chosen by the National Assembly and the Head of State allowing to put the Conseil at bay from the influence of the Chancellerie and the government. All this marked the weakening of the duopole and seemed to delineate an institution able to become a "Conseil du pouvoir judiciaire".

Yet, despite the important investment of the first president of the IVth Republic, Vincent Auriol, in his new role of president of the CSM, over time the duopole effectively managed

[13] On this experiment, the best account is: SIMONE BENVENUTI, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA FRANCESE. UNA COMPARAZIONE CON L'ESPERIENZA ITALIANA (2011).

[14] Piana & Vauchez, *supra* note 3.

[15] Article 84 indicates that "le Conseil supérieur de la magistrature assure, conformément à la loi, la discipline des magistrats, leur indépendance et l'administration des tribunaux judiciaires".

to mitigate the effects of the many constitutional innovations. While president Auriol and other members of the CSM repeatedly asked for the transfer of the administrative capacity of the strategic Direction du personnel from the Chancellerie to the CSM, these attempts to implement Article 84 of the new Constitution were met with sharp resistance. As a consequence, the CSM was bound to remain toothless –as it was confirmed by the fact that it was never granted a budget of its own. In this normalization process, the Conseil d'Etat played a critical role. Not only did it make sure that it would not be superseded in the ranking of State authorities and institutions set up in the official order of precedence, but it also contributed to downgrade its statute, by developing a jurisdictional control over the decisions of the CSM, thereby turning the constitutional and supposedly sovereign institution into a mere administrative organ.[16]

III. The Vth Republic and the Perpetuation the Duopole

The advent of the Vth Republic (1958–now) marked the end of this twelve years' long experiment. In line with the project of restoration of State authority that inspired the Gaullist regime, the judiciary – that was famously coined as a mere "authority" in the new Constitution – underwent a profound transformation. Mostly inspired by de Gaulle's first minister of justice, Michel Debré (who had already conceived the Ecole nationale d'administration-ENA more than a decade earlier), the many reforms were intended to modernize the judiciary turning it into an efficient administrative body and stripping it from what was perceived as the many archaisms of judicial professions.[17] In less than 8 months, Michel Debré issued 13 ordonnances and 31 decrees that profoundly rationalized the organization of the judiciary on the model of the professional bureaucracies with the creation of the concours unique (putting an end to the special judicial body that existed for colonies, the so-called magistrature coloniale) and an Ecole nationale de la magistrature in 1959. This new wave of professionalization did not however undermine the executive stronghold over the GOJ. The underlying conception that inspired the letter and the early years' practice of the Vth Republic was famously summarized in the press conference of the de Gaulle on 31st January 1964: "Power proceeds directly from the people, which implies that the Head of State elected by the Nation be the source and the holder (of power). It should of course be understood that the indivisible authority of the State be granted fully by the people to the President and that there be no other authority, neither ministerial, civil, military or judiciary that is not conferred and maintained by it. It is his task to adjust his own supreme domain to the one whose management he attributes to others".[18] In other words, the judiciary was downgraded to the statute of specialized

[16] Alain Bancaud, *Normalisation d'une innovation. Le Conseil supérieur de la magistrature sous la IVème République,* 63-64 DROIT ET SOCIETE 371 (2006).

[17] Anne Boigeol, *La formation professionnelle des magistrats: de l'apprentissage sur le tas à l'école professionnelle*, 76-77 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 49 (1989).

[18] Unless specificied, translations are mine.

administrative branch placed under the presidential umbrella. Moreover, in the Vth Republic all built around the charisma of the presidential figure, his judicial capacity and power to interfere in the course of judicial affairs was one defining element of its institutional statute. In this context, there was very little place for judicial self-government. Unsurprisingly, the 1958 Constitution turned the CSM into a mere consultative body attached to the president -as indicated in Article 65: "the president is the guardian (garant) of the independence of judicial authority (…); he is assisted par the CSM". Beyond the fact that the CSM lost all its prerogatives in terms of administration of tribunals to the advantage of the ministry of justice, the new Constitution put an end to the election of magistrates' representatives by both the magistrates and the Parliament, replacing it by a nomination of all the members by the president of the Republic. In the new organizational architecture, the secretary general of the CSM, himself a judge directly chosen by the president, was a key figure. Chosen among the presidents' closest collaborators (see Mitterrand's picks), cumulating its position with that of "advisor for judicial affairs" at the presidential office, the secretary general acted as the transmission belt of the executive within the CSM.[19]

The rising concern for the protection of fundamental rights in the 1970s did contribute to raise awareness on the structural subordination of the judiciary to the executive power.[20] At the time leader of the main opposition party, the socialist party, François Mitterrand was himself a harsh critic of this state of affairs: "it is the head of State that nominates the members of the CSM; and it is the CSM that nominates the magistrates; that's all". As a matter of fact, the transformation of the GOJ was one of the 110 propositions that formed the electoral platform with which the socialists won both the presidential and the parliamentary elections in 1981. Interestingly however, the initial political impulse for reforms that resulted in the suppression of military tribunals and the abolition of death penalty left the traditional structure of judicial subordination untouched. Despite some initial reform projects, the new socialist government did not alter the traditional duopole – and even used it to a certain extent when it came to avoid the development of judicial inquiries.[21]

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[19] Alain Bancaud, *Le paradoxe de la gauche française au pouvoir: développement des libertés judicaires et continuité de la dépendance de la justice*, 44-45 Droit et société 61 (2000).

[20] PASCAL MBONGO, LA GAUCHE AU POUVOIR ET LES LIBERTES PUBLIQUES (1981-1995) (1999); Eric Agrikoliansky, *'Liberté, liberté chérie...': la gauche et la protection des libertés publiques dans les années 1970. Hypothèses sur la résurgence de la notion d'Etat de droit ", in* SUR LA PORTEE SOCIALE DU DROIT: USAGES ET LEGITIMITE DU REGISTRE JURIDIQUE (Liora Israël, Antoine Vauchez, Laurent Willemez eds., 2005).

[21] Alain Bancaud, *supra* note 19.

The Conseil supérieur de la magistrature over time:

	Composition	**Competence**	**Population concerned**
1883	Cour de cassation in plenary session	Disciplinary	Sitting judges
1946	14 members Pdt: President of the Republic Vice-pdt: Minister of justice 6 members elected by the Parliament 4 magistrates elected by their peers 2 persons chosen by the president of the Republic	Disciplinary Administration of tribunals Careers	Sitting judges -High magistrates (proposition to the president of the Republic) -Lower ranks magistrates (Opinion on the proposals coming from the ministry of justice)
1958	8 members Pdt: President of the Republic Vice-pdt: Minister of justice 3 magistrates from Cour de cassation 1 member of Conseil d'Etat 2 "qualified personnalities" All chosen by the President of the Republic	Disciplinary Careers	Sitting judges
1993	16 members Pdt: President of the Republic Vice-pdt: Minister of justice Chamber for sitting judges: 5 sitting judges 1 prosecutor Chamber for Prosecutors: 5 prosecutors 1 sitting judge	Disciplinary Careers	Sitting judges: -High magistrates including presidents of courts of appeal and presidents of tribunals (proposition to the president) -Lower rank magistrates (binding Opinion on the proposals coming from the ministry of justice)

	All sitting judges and prosecutors are elected by their peers +1 member of the Conseil d'Etat (chosen by the Conseil d'Etat itself) +3 "qualified personalities" (chosen by the presidents of both assemblies and the president of the Republic)		Prosecutors: -High prosecutors (nothing) -Lower rank prosecutors (Opinion on the proposals by the ministry of justice)
2008	22 members Pdt: president of the Cour de cassation Vice-pdt: chief prosecutor at the Cour de cassation Plenary session: 7 magistrates 1 lawyer (chosen by the national bar council) 1 member of the Conseil d'Etat 6 "qualified personalities" (chosen by the president of the Republic and the presidents of both parliamentary assemblies)	Disciplinary Careers	Sitting Judges -High magistrates including presidents of courts of appeal and presidents of tribunals (proposition to the president) circa 400 positions -Lower rank magistrates (binding Opinion on the proposals coming from the ministry of justice) Prosecutors -High prosecutors (Opinion) -Lower rank prosecutors (Opinion on the proposals by the ministry of justice)

B. The Rise of the Self-Government Paradigm and its Discontents (1993-2008)

I. The Retreat of the Political

The 1990s opened up a new phase for the discussion over the government of the judiciary.[22] It must be said that during the second presidential mandate of François Mitterrand (1988-1995), the general perception of the judiciary changed dramatically in French public sphere. The long tradition of magistrates' political subordination became ever more at odds with the increasing distrust vis-à-vis political actors and institutions (often coined at the time as a "crise de la représentation"). The 1990s were indeed a time of a sharp devaluation of the importance of political commitment in the functioning of certain sectors (media, academic field, judicial unions, etc.) and ramping up of new canons of professional and sectoral excellence that strongly resonated with the criticism of partisan politics. Among these transformations: the progressive move from "journalisme engage" to professional and investigative journalism that turned magistrates into potential allies in the revealing of political corruption;[23] the governance turn of international organizations (OECD, IMF, World Bank) and NGOs (Transparency International) that led to a renewed interest in the issue of public ethics and deontology; the emergence within the political field itself of "moral entrepreneurs" who called for a "political renovation" through Clean Hands Operations[24] also contributed to the emergence of this new context.

While relatively independent of each other, these various movements converged in their joint distrust of political parties and governments and their joint expectations that the judiciary be playing new political and social functions from renovation of politics to the modernization of economic regulation, the rights of "usagers" or the protection of fundamental rights etc.[25] These new hopes were in part met by the rapid blossoming of anti-corruption inquiries. In few years, the reach of judicial investigations actually moved up the ladder of the political hierarchy, rising from political "spade men" and supporters to the very highest level of parties and government. Likewise anti-corruption magistrates gradually penetrated a series of "political sanctuaries". While the first judicial inquiries conducted in the headquarters of political parties were labelled at the time a "judicial burglary" by the then ministry of justice Georges Kiejman, over the years, it has become quite common for prosecutors to search and subpoena political witnesses at the very heart

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[22] Antoine Vauchez, *Judicialization of Politics. Lessons and Questions for the case of the French Fifth Republic, in* LAW AND THE FORMATION OF MODERN EUROPE 96 (Mikael Madsen & Christopher Thornill eds., 2014).

[23] Dominique Marchetti, *Les révélations du journaliste d'investigation*, 131 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 30 (2000).

[24] JUGER LE POLITIQUE. ENTREPRISES ET ENTREPRENEURS CRITIQUES DE LA POLITIQUE (Jean-Louis Briquet & Philippe Garraud eds., 2001).

[25] LA FONCTION POLITIQUE DE LA JUSTICE (Jacques Commaille, Martine Kaluszynski eds., 2007).

of the State: virtually no ministry has escaped searches, whether it be the ministry of Finance, Justice, Health, Foreign Affairs, Defense or the Home Office. Only once has this judicial penetration been brought to a halt –and this is related quite unsurprisingly with the presidential figure: this was in March 2001, when President Jacques Chirac refused to respond to a subpoena convoking him as an "assisted witness" in an investigation of embezzlement of funds related to the attribution of public housing contracts by the City of Paris, of which Chirac had been mayor from 1977 to 1995.[26]

A proliferation of writings in legal doctrine and political theory came to theorize the new position of the judiciary. They pointed at the fact that the judiciary would no longer be in the service of the State, but stood in between the State and civil society, protecting the former against the arbitrary of the latter.[27] In the wake of the anti-totalitarian criticisms that emerged in 1970s within the left, the criticism of the Jacobin Republicanism that structured French political liberalism led to the rehabilitation of the figure of the "third power", now embodied by the judiciary. Elevated to the status of "keeper of the promises"[28] contained in the constitutional pact, the judicial power was henceforth endowed with a direct political legitimacy. Because all these various sector-specific developments concurred in claiming that this evolution of the judiciary was the transformation they had hoped for, i.e. the advent of a "judiciary power", they were natural allies for one another, and they formed a social platform for the judiciary in the public sphere. The profound legitimacy crisis of both Gaullist and socialist parties as much as the new attention for judicial functions triggered a series of legislative reforms that all marked a retreat of the political (and of the governmental) prerogatives. A January 1995 bill on the financing of political campaigns instated the loss of eligibility to political office for certain offenses –a penalty that would later be applied to former prime minister Alain Juppé. Likewise, a new political custom known as the "Bérégovoy-Balladur jurisprudence" (coined after the name of the former prime ministers) solidified from 1992 onwards to oblige ministers to resign from their cabinet posts if they were indicted (seven ministers were thus forced to resigned between 1992 and the mid-2000s when the custom progressively disappeared).

The voting of the July 1993 constitutional reform of the CSM was an essential part of this wave of reforms through which the political body attempted to restore its legitimacy by giving up some of its attributes in judicial matters. Supported jointly by the left-wing president François Mitterrand and the right-wing prime minister of the time Edouard Balladur, the constitutional law did mark a profound rupture in duopole tradition of government of the judiciary. The executive branch as well as the higher ranks of judiciary

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[26] Antoine Vauchez, *Pouvoir judiciaire, in* NOUVEAU MANUEL DE SCIENCE POLITIQUE (2nd ed. 2015).

[27] DENIS SALAS, LE TIERS POUVOIR. VERS UNE AUTRE JUSTICE (1998).

[28] ANTOINE GARAPON, LE GARDIEN DES PROMESSES (1996).

gave up part of their control over the judicial body. This can be seen through the composition of the CSM: while the President of the French Republic and the ministry of justice were sill presiding over the CSM, they did not control anymore the nomination of the other members who were now chosen through election (magistrates) or nomination by presidents of both parliamentary assemblies and the Conseil d'Etat. Likewise, the bill restored the election of a share of the CSM members by magistrates themselves –even though the conditions of elections were featured by an over-representation of higher ranks of the judiciary. One the whole, magistrates actually were in majority with 10 out of 16 members being elected from within the judiciary. The change can also be seen in the competences of the new CSM: the control over careers was considerably reinforced. For the higher ranks of the Bench (the president of the Cour de cassation, chamber presidents at the Cour de cassation, presidents of courts of appeal and also presidents of tribunals), the CSM was actually fully in charge being granted the capacity to make binding nomination proposals to the head of State. For the lower ranks of the Bench, the CSM kept its "Avis conforme", thereby securing a veto power (avis conforme) on the proposals coming from the commission d'avancement of the Chancellerie. Quite importantly, the unity of the judiciary was partially reaffirmed through the inclusion of prosecutors under the jurisdiction of the CSM, albeit in a separate chamber and with purely consultative competences in terms of careers. As the independence of the judiciary became a matter of political debate, some governments even went beyond the letter of the reform. In 1997, the ministry of justice Elisabeth Guigou committed herself to follow the Opinion (Avis) of the Conseil for parquet magistrates' nomination proposals, thereby putting siège and parquet in the same situation (except for the higher ranks of the prosecutors, the so-called procureurs généraux).

II. The Rise of the Judicial Accountability Paradigm and the 2008 Reform of Self-Government

The overall context however changed dramatically in the late 2000s. Coming after a series of widely discussed miscarriages of justice ("erreurs judiciaires") in the 1990s and 2000s ("Raddad", "Dils", "Bonal", "Alègre" affairs) that caused public outrage, the 2005 "Outreau scandal" marked a new turn in the public perception of the judiciary moving from a cognitive frame in terms of independence and self-government to a focus on judicial accountability. The scandal concerned a child abuse case in 2004, in which more than a dozen people were wrongly imprisoned and children were separated from parents from one to three years before being eventually cleared in the appeal before the Cour d'assises in the fall of 2005.[29] While the prime minister, the minister of justice and the president officially apologized to the wrongly accused persons, a special parliamenty enquiry was set

[29] Antoine Vauchez, *Le juge, l'homme et la 'cage d'acier'. La rationalisation de l'activité judiciaire à l'épreuve du 'moment Outreau', in* LA JUSTICE AU RISQUE DES PROFANES 27 (Hélène Michel et Laurent Willemez eds., 2007).

up in order to "draw the lessons from this judicial fiasco".[30] This led to the re-mobilization of a set of actors from the media to members of Parliament or bar associations' representatives that all called for a profound reform of judicial accountability and of judicial self-government. With huge public audience and many polls, the public opinion also made a spectacular entry into a debate that had up until new unfolded in semi-public circles: the issue of public confidence/trust in the judiciary became salient. Widely broadcasted on TV and radio, the audition of the juge d'instruction in the case, judge Fabrice Burgaud, fresh out of the Ecole Nationale de la Magistrature marked a climax. Part of the public discussion that unfolded concerned the judicial misconduct, the scope of judicial responsibility and the extent to which the activity of judging itself should be "sanctuarized" or put under scrutiny. The April 2006 decision by the CSM that sentenced judge Burgaud with a mere reprimand (réprimande avec inscription au dossier), the lowest penalty in the magistrates' disciplinary system, further heated the debate pointing at the necessary reformation of judicial self-government and disciplinary system.

While the political interferences in judicial activities had been in large part disqualified in the 1990s in the wave of the anti-corruption inquiries, the "Outreau scandal" gave politicians and media a renewed opportunity to claim a say over the government of the judiciary in the name of the "justiciable". Playing heavily on the rhetoric of "victims" as well as on the need to hold individual magistrates responsible for their misconducts, Nicolas Sarkozy's 2007 presidential campaign and practice as president (2007-2012) led to a series of heated conflicts with unions and the higher ranks of the judiciary, resulting in a unprecedented wave of public demonstrations of magistrates in February 2011.

The new constitutional reform of the CSM adopted on the 23rd July 2008 by one vote of majority by the Parliament in united sessions emerged in this context. Truly enough, the reform of the Conseil is only one part of an overall modernization of the Vth Republic's Constitution initially designed by an expert committee headed by former prime minister Edouard Balladur (Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions, the so-called "Comité Balladur" of October 2007). In the case of the CSM however, the changes were very much in line with the discussion that had taken place in the Parliament in the wake of the "Outreau affair". The risks and flaws of judicial corporatism were pointed out by the comité Balladur: "the 1993 reform has not reached its objectives as it has not put an end to the conflicts between the government and the CSM; despite the letter of the texts (constitutional and legislative), the CSM has established a so-called "plenary session" whose existence has fueled the criticism of corporatism too often addressed to the judicial institutional".[31] As a consequence, the new

[30] Philippe Houillon, *Rapport fait au nom de la Commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire dite d'Outreau et de formuler des propositions pour éviter leur renouvellement*, Assemblée nationale, June 2006.

[31] Comité de réflexion et de proposition sur la modernisation et le rééquilibrage de la Vème République présidé par M. Edouard Balladur, Report to the president of the Republic 78 (October 29, 2007).

institutional design downsized the role of magistrates who actually do not constitute a majority in the Conseil anymore. In each one of the two specialized chambers of the CSM (Sitting judges and Prosecutors), the "lay members" (i.e. chosen from outside the judiciary) were made more numerous (8/15) than the elected representatives of the magistrates (7/15). At one and the same time, the capacity of the institution to act as the spokesman of the judicial power was circumscribed: while the 2008 reform recognizes the possibility of "plenary sessions", it tries to channel a practice that had raised the fear of an emerging judicial power.[32] The current Article 65.8 officializes such practice but makes sure that in case the CSM would meet in plenary session, magistrates remain in minority.

This did not mean however that the 2008 reform marked a return to the pre-1993 situation. As a matter of fact, the president and the ministry of justice did not re-gain any competence: to the contrary, they were further marginalized as they were no more part of the Conseil itself. Symbolically, the CSM left the presidency's buildings where it had met ever since 1946 (Quai Branly) and moved for the first into buildings of its own (Hotel Moreau). The overall project was more geared towards establishing a broader public and professional accountability of the judiciary.[33] As a way to give voice to representatives of the "justiciables", new members were called upon to take part to the Conseil, in particular a lawyer chosen by the representative body of the legal profession (Conseil national des barreaux) and six "personnalités qualifiées (PQ)" who could not belong either to the judiciary, the Parliament and the administration and were chosen by political authorities (the president of the Republic, president of the lower and the higher chamber). Interestingly, the parliamentary committees of the National Assembly and of the Senate were given the possibility to audition these six PQ and eventually block their nomination by a qualified majority. Another important aspect in this regard lies in the opening of a new procedural pathway for the opening of disciplinary proceedings. Up until 2002, only the ministry of justice could open a disciplinary case: while a first opening had occurred in 2002 as the capacity to initiate a case was extended to heads of tribunals, the 2008 constitutional reform opened this possibility to the litigants themselves. As stated in the Loi organique of 22 July 2010 that enacted the constitutional reform: "Any party who considers during proceedings to which she is a party that the behavior of a judge could be qualified as a disciplinary issue may call upon the Conseil supérieur de la magistrature to

[32] It should be remembered that in 1994, the president of the Republic asked the Conseil to meet in plenary session asking for advice; later on, the CSM spontaneously gathered in full composition a couple of times, thereby claiming to be a legitimate interlocutor of political power and of the judicial body.

[33] In terms of careers, there was little change except for prosecutors*:* while up until 2008, the CSM was entirely kept outside of the nomination of higher positions of prosecutors (ie the nominations decided in the framework of the *Conseil des ministres*), the reform introduced a compulsory yet non binding Opinion of nomination proposals from the CSM.

intervene."[34] The effect of the 2008 innovation seems up to now to have remained rather limited in size given the filtering role of the commission d'admission des requêtes (CAR) composed of two magistrates and two "lay members".[35] In this context, the fear expressed by many unions of exposing magistrates to the "tribunal de l'opinion" was surely exaggerated. The most recent data indicate that the number of complains has remained rather stable over time (around 200-250 per year); the filtering role of the CAR has been stringent with only 46 cases out of the total of 1751 registered between 2011 and 2016 considered admissible. Out of these 46 cases, only five individuals (one procureur de la République and four judges) have been brought to the section in charge of disciplinary pursuits within the CSM.[36]

The Conseil supérieur de la magistrature ever since the 2008 Reform:

Specialized Sessions	
Sitting judges' Chamber (15 members for Nominations matters) (15+1 for Disciplinary matters)	Prosecutors' Chamber (15 members for Nominations matters) (15+1 for Disciplinary matters)
President of the Cour de cassation (president)	Chief Prosecutor at the Cour de cassation (president)
5 sitting judges (elected)	5 prosecutors (elected)
1 prosecutor	1 sitting judge
Lay members 1 member of the Conseil d'Etat (chosen by the Conseil d'Etat) 1 lawyer (avocat) 6 Qualified personnalities chosen outside of the judiciary (chosen by the president of the Republic, the president of the National Assembly, the president of the Senate)	

[34] Translated by the author. Original text: "Tout justiciable qui estime qu'à l'occasion d'une procédure judiciaire le concernant le comportement adopté par un magistrat dans l'exercice de ses fonctions est susceptible de recevoir une qualification disciplinaire peut saisir le Conseil supérieur de la magistrature".

[35] On the conditions of admissibility (and rejection) of these claims, see MICHEL LE POGAM, LE CONSEIL SUPERIEUR DE LA MAGISTRATURE 29-32 (2014).

[36] Data from the 2016 Report of the CSM, at 85.

Plenary Sessions
Presided over by the Premier president de la Cour de cassation (the Procureur général as deputy) 3 sitting judges 3 prosecutors 8 lay members (supra)

C. "Une Constance Mobile"? Assessing the Current State of the Government of Judiciary

Ever since the early 1990s when the issue of the judiciary became more and more politically salient, the GOJ has entered a phase of continuous transformations. As the political framing of the stake of judicial reform kept on changing over time (from the promotion of the fight against political corruption to the prevention of judicial miscarriages, from right wing governments more inclined in promoting magistrates' liability to left-wing governments more interested in promoting the independence of the judiciary), different waves of proposals emerged for the reform of the CSM. Yet, interestingly enough, despite this erratic pattern of reforms, the trajectory of French GOJ has remained in substance unaltered. To a certain extent, it even appears as a "constance mobile", to paraphrase Alain Bancaud's caracterization of late XIXth century Cour de cassation, as the general asset of co-management between the ministry of justice and the CSM was proving resilient despite constant institutional changes.

Hereafter, we provide substantial evidence for this pattern as we consider the independence, accountability and legitimacy and French GOJ.

I. Independence

Given the fuzziness intrinsic to the notion of "independence",[37] it is almost impossible to provide a substantial assessment of its changing "levels" within French judiciary. Hereafter we have chosen a narrow definition thereof, one that points at the institutional deadlocks through which the executive branch maintains forms of control over the government of the judiciary (nominations, career promotions, possibilities of interfering in the course of a case, etc.). In this regard, the overall narrative of progress that points at the uninterrupted

[37] Isabelle Boucobza, *L'énigme de l'indépendance des juges en France, in* POLITIQUE DE L'INDEPENDANCE (Bastien François, Antoine Vauchez eds., 2018).

rise of judicial self-government and the progressive retreat of the "political" is well grounded. However, the issue remains more complex to settle. As we have seen all along our historical excursus, not all reforms have been geared towards the attempt to put the CSM at more distance from political bodies. Others such as the 2008 one, have targeted other objectives –starting with an overall reinforcement of magistrates' liability. Moreover, the "rise and rise" narrative of progress also overshadows the striking elements of continuity with the deep-seated duopole tradition of government.

All in all, careers of sitting judges are still co-managed by the CSM and the Chancellerie. The CSM certainly gained an important say on the career moves from the first nomination at the exit of the Ecole nationale de la magistrature to changes in function within one tribunal or the moves outside of the judiciary. However, it is far from being an exclusive competence as careers remain a matter of shared competences with other administrative bodies of the ministry of justice –from the Direction des services judiciaires[38] of the Chancellerie to the commission d'avancement.[39] The latter which is partly elected by judges and partly composed of top civil servants of the Chancellerie (coming from both the General Inspectorate and Directorate of Services judiciaires administration) still retains important competences at the early stage of the career -as it is in charge of establishing the "tableau d'avancement" listing the judges with more than 10 years of service who are entitled to apply for higher judicial offices.[40] The former still keeps the monopoly of proposition (to the CSM) for most judicial nominations: except for the higher ranks of the Bench, i.e. circa 400 sitting judges, in 95% of the nomination cases,[41] the CSM has no control over the list of candidates on whom it is going to give its Avis. In a series of widely discussed interventions, the current first president of the Cour de cassation and currently president of the CSM has asked that "all sitting judges be nominated on the initiative of the CSM".[42] The problem is however more profound that the Direction des services judiciaires (DSJ) also concentrates most of the expertise when it comes to "human resources" in particular thanks to a rich toolbox of statistical and computer instruments. Despite being an organ of constitutional rank, the CSM is deprived of direct access to the DSJ toolbox of

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[38] The *Direction des services judiciaires* is the directorate of the ministry of justice in charge of all organizational/administrative matters related to tribunals and magistrates.

[39] It should also be said that courts' presidents have retained an important role as they are the ones in charge of the yearly individual assessment of judges. More broadly, they have important administrative powers -in terms of organizing the daily allocation of cases and the overall organization of the court- that can constitute a threat to judges' independence. See Antoine Garapon & Harold Epineuse, *Judicial Independence in France, in* JUDICIAL INDEPENDENCE IN TRANSITION 273 (Anja Seibert-Fohr ed., 2012).

[40] The *commission d'avancement* also decides over the recruitment of magistrates through derogatory procedures (a pathway which has been increasingly used to recruit magistrates over the past decade).

[41] Cf. Michel Le Pogam, former member of the Conseil in his well documented book on the Conseil, *supra* note 35.

[42] Bertrand Louvel, *Pour échapper à la suspicion, il faut modifier le système de nomination des juge*, LE MONDE (May 30, 2016).

statistical instruments and computer software that would allow the CSM to get a clearer picture of the context of a tribunal or of specific judicial function to which a judge is nominated. These various deadlocks seem to be all the more important that, in its constant practice, the Conseil has shown to be very cautious in rejecting the ministry's nomination proposals. A recent report from the CSM pointed out that, for the 2006-2012 period, out of the circa 1100-1300 nominations' proposals examined every year , only 25 to 41 cases had been given negative Opinions ("Avis non conformes") by the CSM.[43] The same could be said about prosecutors since, out the 550 to 650 nominations' proposals considered at CSM, only from 5 to 15 received negative avis every year. On the whole, the CSM has limited its veto power vis-à-vis the Chancellerie's proposals to 2-3% of the cases.

The most striking case of continuity in the duopole tradition of government remains that of the parquet magistrates. Only in 1993 was the Conseil granted a competence (albeit at the time merely "consultative") over the careers of prosecutors. Up until then, the matter was dealt exclusively within the ministry of justice. Ever since, a number of constitutional reform proposals, starting with the ones put forward by socialist governments in 1998 and in 2013, have been targeted at turning the Opinion (Avis simple) given over nominations' proposals made by the ministry of justice into a binding Opinion.[44] The 2013 reform project even ambitioned to give the CSM a substantial role in terms of discipline (not just consultative as is the case now).[45] Similarly, it aimed at giving the CSM a real role in matters of disciplinary control over prosecutors, turning the CSM into a "disciplinary council of prosecutors". While both 1998 and 2013 proposals were abandoned due to the lack of qualified majority required for constitutional reforms, their failure also refer to a general reluctance within French political and legal culture to align the statute of parquet judges with that of sitting judge. The recent and much expected decision of the Conseil constitutionnel (CC) on the issue of independence of parquet magistrates is very telling in this regard as it recognizes at one and the same point the independence of parquet magistrates and… their political dependence to the government: "The Constitution establishes the independence of prosecutors, which implies that they freely exercise of their activity in jurisdictions, that this independence has to be conciliated with the prerogatives of the government and that it is not secured by the same safeguards as the ones applicable to sitting judges".[46]

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[43] Data CSM report 2017, at 20-21.

[44] It should be said, however, that despite the repeated failures of these constitutional reforms, the institutional practice over the past decades has seen no nomination of prosecutors that had receive an "avis défavorable" from the CSM.

[45] It should be added that president Macron has announced during his campaign a profound constitutional reform of the role of prosecutors that would cut the transmission belt with government. Given the absence of the three-fifth majority in the two parliamentary assemblies required for constitutional revisions, the reform seems unlikely.

[46] Conseil constitutionnel, Décision n° 2017-680 QPC (Dec. 8, 2017).

Beyond career issues, the French CSM is far from being able to claim a form of speakership in the name of the "judicial power" the way the Italian CSM has managed to do over time.[47] One of the reasons lies in the fact that the CSM has found very few supporters in the public debate. Quite expectedly, judicial unions have been the Conseil's staunchest supporters. While the two judicial unions, the left-wing Syndicat de la magistrature and the more moderate Union syndicale des syndicats differ both in terms of political leanings and in terms of connections with social movements and civil society, they are equally promoting both internal and external independence. Claiming more than 2200 members out of the circa 8000 judges, the Union syndicale des magistrats, a union born in 1974 out of the old Union fédérale des magistrats (created in 1945), still holds a large majority within the judiciary (between 62% and 72% of the votes at the election of judges' CSM representatives ever since 2002).[48] While the Syndicat de la magistrature has remained in minority (from 27% to 31% of the votes in the last four CSM elections), it is still influential through its publications (J'essaime and Délibérée) and its many connections with the network of human rights' organizations (Ligue des droits de l'homme, Amnesty, etc.).[49] However, over the years, their joint commitment in the defense of judicial independence has found little support within the political body and in the media.

Relatedly, the CSM has hardly moved beyond the realm of disciplinary power and career management, leaving to the side subject matters that are usually considered to be critical for self-government: recruitment of judges (particularly through the so-called concours complémentaires that recruit judges on the based of previous professional experience),[50] initial and vocational training (the Judicial Academy – the Ecole nationale de la magistrature - is placed under the "tutelle" of the minister of justice who nominates its director), professional moves in national, European, or international administrations (détachement), or in the private sectors, etc. Moreover, the legislator has continuously curbed all attempts by the CSM to take a direct part in the public discussion. The reluctance of political actors to grant such a role can be seen in all the political resistances against the development of CSM "plenary sessions". While the 2008 reform has for the first time officially recognized an advisory function to the CSM through its "Opinions" upon demand from the head of State or the ministry of justice, it however did forbid any "spontaneous" intervention of the Conseil in the public debate. Interestingly enough, this

[47] Piana & Vauchez, *supra* note 3.

[48] *See* the results at http://www.union-syndicale-magistrats.org/web2/themes/fr/userfiles/fichier/reserves/elections/csm/csm2014_resultats.pdf.

[49] On judicial unionism in France, see the special issue *Faut-il craindre le syndicalisme judiciaire*, 3 CAHIERS DE LA JUSTICE (2016).

[50] On these procedures that account for the recruitment of 26% of the magistrates, see http://www.gip-recherche-justice.fr/wp-content/uploads/2014/07/10-31-RF.pdf.

reluctance seems to be shared by the Conseil constitutionnel which censured an article of the Loi organique 22 July 2010 which granted the CSM with an autonomous capacity to intervene. On the whole then, the CSM "speaks" very little. It is not until 1993 that the CSM has started publishing a Rapport annuel presenting its activities, explaining its policies (criterias, guidelines, cases, etc.) and providing special thematic inquiries (in the field of deontology, public opinion towards the judiciary, etc.), the way all other high councils and supreme courts have do for a long time (in particular the Conseil d'Etat).

Overall, the dominant conception of the Conseil supérieur de la magistrature remains that of an administrative organ, far from the constitutional statute of a sovereign Council of judicial power. Truly enough, the CSM has emerged as a more autonomous institution over the past two decades. Just to mention one emblematic indicator in this direction, a Loi Organique of the 22nd July 2010 has granted budgetary autonomy to the Conseil which now has a budget separate that its president negotiates directly with the bureaucracy of the ministry of finance and discusses in auditions before the finance committees of both the Senate and the National Assembly.[51] However, no reform has actually ever changed the fact that CSM is considered in the Constitution as the "assistant" to the president of the Republic in its mission of "garant de l'indépendance de la justice" (art. 64). In line with its historical attitude vis-à-vis the CSM,[52] the Conseil d'Etat has even consolidated this modest definition of the French way of self-government. While its intervention may have contributed to reinforce guarantees protecting magistrates' defense rights in the context of disciplinary sanctions, it has brought the CSM under its jurisdictional umbrella, limiting the effects of the various constitutional innovations that had granted it a constitutional statute. From 1953 Falco et Vidaillac decision to a more recent Gengis Khan decision of 29 October 2013, the Conseil d'Etat has developed its jurisdiction control over CSM decisions. In the 2013 arrêt, the Conseil d'Etat has decided that it was competent to review the "Avis non conforme" delivered by the CSM –thereby opening an entirely new pathway for the supervision of the CSM, confirming the role of the Conseil d'Etat as a "court of appeal" of the CSM proceedings and limiting the latter's autonomy.[53]

II. Accountability

The magnitude of change should also be qualified when it comes to the issue of judicial accountability. While the legal grounds on which French magistrates' conduct are judged in the context of disciplinary control have always been rather vague, the institutional practice

[51] Up until then, the budget of the CSM was part of the general budget of the judiciary and its resources were therefore granted and decided over by the Ministry of justice (the head of the Direction des services judiciaires).

[52] Alain Bancaud, *supra* note 19.

[53] By many standards, the *Conseil d'Etat* is a 'court of appeal' for individual magistrates as they can appeal before it all individual decisions regarding issues of nomination, career, professional assessment, sanctions, etc.

as much as the CSM disciplinary jurisprudence has remained rather restrictive in terms of the scope of judges' responsibility. More importantly, as New Public Management policies were progressively hitting the judiciary, the role of both the hierarchy and the ministry has ironically been reinforced through their increasing role in the management of the judicial body.

Article 43 of Ordonnance of 22 December 1958 (the statute of the judiciary), still the main legal ground for disciplinary complaints, provides a very broad definition of what constitutes a "disciplinary fault": "tout manquement par un magistrat aux devoirs de son état, à l'honneur, à la délicatesse ou à la dignité, constitue une faute disciplinaire". Truly enough, over the years, a jurisprudence has consolidated within CSM disciplinary chambers (but also at the Conseil d'Etat) that has helped specified these rules and principles: ever since 2006, the CSM publishes an updated Recueil des décisions disciplinaires (accessible online) bringing together all disciplinary decisions ever since 1958. Even though the activity of the disciplinary section has increased rapidly over the past 15 years, moving to a rhythm of 51 decisions per year between 2000 and 2009 (for both the prosecutors and sitting judges).[54] it still remains rather modest –in part due to the stringent filtering role of the commission d'admission des requêtes (CAR) of litigants' complaints ever since 2008.

Important limits have been put to the scope of judicial responsibility. In a series of important decisions, the Cour de cassation has expressly excluded the content of judicial decisions from the realm of criminal responsibility: "in virtue of the constitutional principle which guarantees the independence of magistrates, their judicial decisions can be criticized in terms of motives only through the judicial remedies organized by the law; this principle, just as the secret of judicial deliberation, prohibit that a judicial decision be considered as constituting in itself a crime or an offense".[55] A similar principle has been developed by the CSM in its disciplinary powers: "magistrates' procedural acts can only be criticized by using the judicial remedies organized by the law for the parties to the trial".[56] However, in the wake of the "Outreau affair" and what has been viewed as judge Burgaud's personal responsibility in the case, the Parliament has made a first breach indicating as a possible disciplinary ground "a serious and intentional violation by a magistrate of a procedural rule which constitutes an essential guarantee of the parties as certified by a judicial decision":[57] however, at the stage, no disciplinary claim has been made on this new ground.[58]

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[54] Michel Le Pogam, *supra* note 35, at 52-61.

[55] Cour de cassation, Crim. (Dec. 9, 1981).

[56] CSM, decision S57 (Dec. 12, 1991), *Recueil des décisions disciplinaires*, la documentation française 243 (2004).

[57] Loi Organique of 22 July 2010.

[58] Michel Le Pogam, *supra* note 35, at 52-61.

However, while the disciplinary, civil and criminal forms of responsibility have remained rather weak,[59] the judiciary has been touched by the emergence of new standards of accountability for public service. Despite the traditional claim that the judicial activity is not measurable, the rapid diffusion of New Public Management (NMP) within the French bureaucracy has profoundly transformed the benchmarks and policy instruments through which the "quality" of justice is being perceived and assessed.[60] It is not the place here to chronicle the process through which this managerial turn has hit French judiciary from the late 1990s onwards. It is however important to note its destabilizing effects over the government of the judiciary as a variety of think tanks, media and business actors promoting this NMP turn have pointed out the archaic corporatism that lied underneath the professional "rhetoric" of independence.[61] The two important reforms that have marked the development of NMP in French administration (the new Loi Organique sur la Loi de Finances-LOLF in 2001 and the Revue générale des politiques publiques-RGPP in 2007) have turned the judiciary into one of the 34 "Missions" of the State, identifying a set of Programmes, Objectives, and eventually Indicators of performance in terms of "flux", "stocks", "average length" of trials. A whole culture of auditing and management diffused within the judicial institution bringing to the forefront a rhetoric of "users" (usagers) and a toolbox of software allowing for central supervision of the performance of tribunals and the advancements of dossiers (Cassiopée et Pharos) by presidents of tribunals and by the Chancellerie. Although it did raise concerns and protests among magistrates, a "wage premium" on the basis of productivity has been introduced on the basis of judges' productivity.[62] Just like in all NMP reforms, this has come along with a process of centralization that reinforced the role of heads of jurisdictions and of the Chancellerie. While the latter increased its governing capacity with the creation in 2005 of a position of secretary general in charge of coordinating the modernization of the judicial body, the former have been given the task to allocate the new wage premium –notably on the basis of judges' performance. On the whole then, the duopole of courts' presidents and the

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[59] To that must be added the "deontological turn" that has touched the judiciary. In 2005, a *Rapport* of the *Commission de réflexion sur l'éthique dans la magistrature* (Commission Cabannes) was commissioned by the ministry of justice. In the reform of the judiciary that directly derived from the "Outreau affair" (*Loi organique* du 5 March 2007), the Parliament asked the CSM to write a *Recueil des obligations déontologiques du magistrat*. The volume that came out in 2010 and has been regularly revised ever since is not a Code; it provides mostly guidelines of what is a "normal professional behavior". This has now become one of the prerogatives of the CSM. A doctrine has emerged around the "3 I" pilar: independence, impartiality and integrity to which the CSM has added "attention à autrui", "discretion" and "reserve". It was clearly part of an overall phenomenon of "responsabilisation" of public officials.

[60] On this, *see* ANTOINE VAUCHEZ & LAURENT WILLEMEZ, LA JUSTICE FACE A SES REFORMATEURS. ENTREPRISES DE MODERNISATION ET LOGIQUES DE RESISTANCE (2007).

[61] For an example, see the report from the liberal conservative think tank Institute Montaigne, *Pour la justice* (2004), http://www.institutmontaigne.org/publications/pour-la-justice.

[62] Elise Chelle, *Une politique de récompense dans la haute magistrature: le cas de la prime de rendement*, 78 DROIT ET SOCIETE 407 (2011).

Chancellerie is the clear winner in the spectacular rise of managerial accountability within the judiciary over the past decade.

III. Legitimacy

When it comes to legitimacy, change is certainly even more difficult to measure. In contemporary democracies, public opinion as measured by polls constitute the most common proxy for legitimacy. However, the relationship between the judiciary and the public opinion is a complex one and certainly hard, if not impossible, to decipher. To be sure, professionals of the judiciary traditionally have a strong reluctance to even consider "public opinion" given the fact that their very activity is supposed to be independent from any form of public pressure. However, over the past decades, the relationship of public institutions to the general opinion has become more complex. Ever since the 1970s when judicial unions were calling for more connections with civil society,[63] judges have increasingly taken stances in the public debate, even launching Manifestos and Public Calls (see for example back in the 1990s, the Geneva call of anti-corruption judges). Moreover, in a context where all public institutions are summoned by the media to be more accountable to the public opinion, the judicial institutions can hardly avoid taking an interest in what polls and qualitative surveys had to say about the level of public trust (or distrust) in courts and judges. This became particularly true in a context of "penal populism" in which politicians would frequently invoked "claims" from public opinion against the allieged "laxisme" and "un-accoutability" of professional judges. The CSM itself started to wonder about the public opinion commissioning an important survey in 2008 published in a Report quite emblematically entitled "Restoring confidence".

In polls even more than in any statistical inquiry, figures are hard to interpret. Citizens' ordinary relationship with the judiciary is difficult to assess. Not only has the vast majority of them no practical experience of it, but they are also kept at bay from a more immediate understanding of the judiciary by the thick layer of legal language, judicial symbolism and professional rituals.[64] Just like for political institutions, the expression of an "opinion" on the judiciary requires a level of competence that is very unevenly distributed among the population and is mostly connected to the level of diploma and the social category. In this context, it is hard to know what is exactly measured by polls – if not the continuous saliency of deep-seated clichés on the institution. In any event, polls are probably not able to provide a measure of the public opinion's reaction to the recent transformations of its institutional design -the important rate of non-respondents is actually indicative of the fact that "opinions" are neither consistent, nor stable on the subject matter. Moreover, the

[63] Remi Lenoir, *La parole est aux juges. Crise de la magistrature et champ journalistique*, 101-102 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 77 (1994).

[64] On this, see Bastien François, *Une demande politique de justice. Les Français et la justice*, Rapport pour le GIP (1998).

different surveys that have been done in the judiciary seem to bring changing figures from one poll to another: while some polls seem to indicate a decline of the "trust" to historically low levels (55%), other inquiries –including the one commissioned by the CSM itself- point at very positive opinions (92% !).[65] Figures are more meaningful in relative terms. For what it's worth, the level of "trust" in the judiciary (63%) locates the former in an intermediate position, lower than the one in "public services" (hospital 89%; school 82%; army 81%; police: 76%) but quite higher than the "trust" in politicians (elected officials: 44%) and the medias (31%).[66] With all due precautions mentioned here above, a comparison of polls over time show a relative stability of "trust" during the past decade moving from 63% in 2008 to 55% in 2011 and 55% in 2017.[67] Beyond the broad and rather undefined question of "trust" (*confiance dans la justice*) that repeatedly appears in polls, results are probably more interesting when they get to measure differentiated opinions on the concrete "functioning of the judiciary" - which proves to be much more critical. Nothing new here, this is an old phenomenon: already in the late 1970s, two-thirds of the French citizens had a critical view on the subject-matter,[68] with the persons having had a direct experience of the institution giving more critical views than the other ones. Here again, the figures prove remarkably stable over the time with 35% of the respondents considering that the judiciary works "well" in 1999 and 37% in 2017.[69] Interestingly, this opinion on the judiciary varies a lot along social categories from 32% among employees to 50% among "cadres" and intellectual professions.

All in all, however, existing polls do not allow to draw a picture that is much different than the one describing the relation of the public (and its various social components) to other "public institutions". In the end, it is more the political and administrative elites that, as identified in the article, show a distinct distrust vis-à-vis the judiciary – and its mounting claims for autonomy and self-government. As I have tried to show here, successive governments and bureaucracies have proved strikingly resistant to claims as well as attempts aims at positioning the Conseil at the top of the government of the judiciary. While the diminishing legitimacy of the political and the rise of anti-corruption justice have led to reforms granting more importance to the CSM, its many transmission belts with political and administrative spheres have been maintained over time. Here is not the place to identify the blame (or absolve!) - starting with the deep technocratic entrenchment of French governmental elite from the breeding of the Ecole nationale d'administration to

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[65] Conseil supérieur de la magistrature, *Les Français et leur justice. Restaurer la confiance* (2008); Laure Cretin, *L'opinion des Français sur la justice*, 125 INFOSTAT (Jan. 2014).

[66] *Id.*

[67] Ifop, *Le regard des Français sur la justice*, March 2017: https://www.village-justice.com/articles/IMG/pdf_114547_-_rapport.pdf.

[68] François, *supra* note 64.

[69] *Id.*

ritual passage in ministerial offices. Suffice it to identify here its effects in a deep-seated tendency to over-estimate the risks of judicial independence and to under-estimate the perils related to political subordination. As a result, despite the fact that the CSM has undoubtedly gained competences and institutional autonomy, it remains firmly embedded in a dense web of links and dependences that secure its integration within the body of the State.

Articles

Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model

Simone Benvenuti & Davide Paris*

Abstract

The Italian model of judicial self-government is often presented as a successful example of institutional reform to be copied in young democracies. This paper provides a deeper and multifaceted image of it and takes stock of its performance in securing the independence and the accountability of the judiciary. It first maps the rationale and the actors of judicial self-government in Italy, stressing, in particular, that the Italian model of judicial self-government not only aims at preventing the influence of the judiciary by external powers, but it is also equally concerned by threats to judicial independence coming from within the judiciary. It then provides a longitudinal analysis of the impact of this model of judicial self-government on the values of the independence and the accountability of the judiciary after the establishment of the High Council of the Judiciary in 1958. While acknowledging the crucial role of this body in securing the independence of the judiciary, this article claims that the values of independence and accountability of the judiciary have been achieved only progressively and partially.

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A. Introduction: An Italian Export Product

Opinion n. 403/2006 of the Venice Commission on judicial appointments acknowledges that "a variety of different systems for judicial appointments exist and that there is not a single model that would apply to all countries".[1] However, when it comes to providing advice to new democracies on how to design the appointment system of judges in order to secure judicial independence, the same opinion formulates a set of recommendations that fully correspond to the Italian High Council of the Judiciary (*Consiglio Superiore della Magistratura*, hereinafter 'CSM'). According to the Venice Commission, for example, "the direct appointment of judges by the judicial council is clearly a valid model" (§ 17); "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself", while other members should be elected by Parliament with a qualified majority among persons with appropriate legal qualifications (§ 29 and 32); "judicial council should have a decisive influence on the appointment and promotion of judges and […] on disciplinary measures against them" (§ 25), and so on. This is nothing else but a description of the CSM.

This opinion is just one of the several examples that testify to a strong preference for the Italian model of judicial self-government ('JSG') by the institutions of the European Union and of the Council of Europe.[2] No doubt, the CSM is a successful Italian export product. Introduced by the 1948 Italian Constitution as the first of its kind,[3] it served as a model for the new democratic constitutions of Greece, Portugal, Spain first, and then, under the pressure of the European institutions, for the constitutions of the newly established democracies in Central and Eastern Europe. This paper aims to provide a deeper and multifaceted image of the Italian model of JSG. In drawing attention on some less apparent features yet crucial for its proper understanding — such as the existence of a plurality of governing bodies, the awareness of the multidimensional character of independence and the relevance of accountability issues— it stresses that the goals of the independence and of the accountability of the judiciary have been achieved only *progressively and partially* and they relate to a complex institutional framework which includes other formal and informal actors besides the CSM.

The analysis proceeds as follows. Section B maps the rationale and the actors of the Italian model of JSG. It pinpoints the understanding of the principles of separation of powers and of judicial independence that lays at the foundation of the Italian model of JSG, with a

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[1] European Commission for Democracy Through Law (Venice Commission), Opinion n. 403/2006 of 22 June 2007, *Judicial Appointments*, Report adopted by the Venice Commission at its 70th Plenary Session (March 16–17, 2007), <www.venice.coe.int>.

[2] See DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT 126 et seq. (2016), in particular at 135.

[3] Article 83 of the Constitution of the IV French Republic (27 October 1946) established a "High Council of the Judiciary". However, judges were not the majority.

particular emphasis on the balance between the so-called external and internal independence (B.I). It also provides an overview of the main actors involved in the judicial government and of their interactions (B.II). Section C analyses the impact of this model of JSG on the values of independence (C.I) and judicial accountability (C.II) by showing how and to what extent these have been achieved following the establishment of the CSM in 1958 until nowadays. The conclusion takes stock of the Italian model of JSG, stressing the achieved results – and the reasons thereof – as well as the challenges that remain open.

B. Rationale and Actors of Judicial Self-Government in Italy

I. Judicial Self-Government and Separation of Powers in the 1948 Constitution

The first appearance of the cornerstone institution of the Italian system of JSG, i.e. the CSM, dates back to law no. 511 of 14 July 1907, which established it as a body consisting of judges and public prosecutors partly elected by the judiciary itself, with relevant advisory powers concerning the hiring and the careers of the magistrates.[4] During the fascist regime, the CSM was both deprived of its self-representative nature, and curtailed in its powers, while the administration of magistrates' careers was concentrated in the hands of the Ministry of Justice ('MJ'), to the obvious detriment of the independence of the judiciary.[5] After the fall of the authoritarian regime, the CSM was soon given back its elective character and some relevant powers through law no. 511 of 31 May 1946, just before the Constituent Assembly started its work.[6] However, while a certain continuity between the pre-Republican and the current CSM can be traced, the 1948 Constitution strengthened its autonomy and competences in such a way that the current CSM can rightly be considered as an innovation of the Republican Constitution.[7]

The institution of the CSM as the cornerstone of the independence of the judiciary was never put into question during the work of the Constituent Assembly. Indeed, already

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[4] Law of 14 July 1907, n. 511, *Riforma dell'ordinamento giudiziario*, promoted, together with Law of 27 July 1908, n. 438, *Per le guarentigie e la disciplina della magistratura*, by the then Minister of Justice Vittorio Emanuele Orlando. See also Royal Decree of 14 December 1921, n. 1978, *Sull'ordinamento giudiziario*, so-called Decree 'Rodinò'. See ANTONELLA MENICONI, STORIA DELLA MAGISTRATURA ITALIANA (2013).

[5] See Royal Decree of 30 December 1923, n. 2768, *Testo unico delle disposizioni sull'ordinamento degli uffici giudiziari e del personale della magistratura*, so-called Decree 'Oviglio', and Royal Decree of 30 January 1941, n. 12, *Ordinamento giudiziario*, so-called 'ordinamento Grandi'. See Guido Neppi Modona, *La magistratura ed il fascismo*, POLITICA DEL DIRITTO 596 (1972).

[6] Royal Legislative Decree of 31 May 1946, n. 511, *Guarentigie della magistratura*, so-called Decree 'Togliatti'. Notice that the Decree purposely bears the same name as the 1908 Law (*supra* note 4), to express the reestablishment of the liberal guarantees after the Fascist authoritarianism.

[7] ALESSANDRO PIZZORUSSO, L'ORGANIZZAZIONE DELLA GIUSTIZIA IN ITALIA: LA MAGISTRATURA NEL SISTEMA POLITICO E ISTITUZIONALE 40 (1990).

within the Study Commission established by the Ministry for the Constituent Assembly and then throughout all phases of the Constituent Assembly's work, a broad agreement was reached on the following point: in order to secure the independence of the judiciary it is necessary that the Constitution releases magistrate careers from the will of the executive power.[8] Therefore, the administrative functions concerning the status of the magistrates, as well as disciplinary proceedings against them, had to be removed from the sphere of competence of the MJ and assigned to an independent body.

Unlike in other legal orders, the lack of an at least indirect link between the judiciary and the source of the sovereignty – the people – has never been considered problematic under the perspective of the democratic principle and of the principle of popular sovereignty embodied in the first Article of the Italian Constitution.[9] This is because the judiciary is not understood as a law-creating but as a law-applying authority. Therefore, the source of its legitimacy is not to be found in its appointment by the representatives of the people, but in its subordination to the legislature's will only, as Article 101, para. 2 spells out.[10] After all, judges and public prosecutors are civil servants recruited by public selection,[11] whose independence is so crucial to the rule of law that must be protected by special arrangements. This justifies their freeing from the executive power to which all civil servants in principle are subordinated.[12]

Interestingly enough, the principle that power over magistrates' careers was to be taken away from the executive power and bestowed to an independent body was meant to protect their independence, not only from other powers – and notably from the executive power – but also from potential pressures and influences coming from within the judiciary. In the deliberations of the Constituent Assembly, indeed, the concept of judicial independence clearly refers both to the so-called 'external independence' – i.e., from outside the judiciary – and to the so-called 'internal independence' – i.e., from the

[8] See *Ministero per la Costituente, Commissione per studi attinenti alla riorganizzazione dello Stato* (so-called 'Commissione Forti'), RELAZIONE ALL'ASSEMBLEA COSTITUENTE, 1 RELAZIONE DELLA PRIMA SOTTOCOMMISSIONE 'PROBLEMI COSTITUZIONALI' 32 and 256–257 (1946), available at http://legislatureprecedenti.camera.it/.

[9] Article 1: "Italy is a Democratic Republic, founded on work.//Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution."

[10] Article 101, para. 2 of the Italian Constitution: "Judges are subject only to the law".

[11] So Article 106, para. 1 of the Constitution. Paras. 2 and 3 of the same Article provide for some limited exceptions.

[12] This understanding of the role of the judge does not necessarily lead to a mechanical conception of the judicial function: in Italian legal scholarship – as everywhere – the "creative" nature of the interpretation of law has long been acknowledged.

influence of senior/more powerful magistrates over younger ones.[13] Article 107, para. 3, in particular, testifies to this concern by providing that "magistrates are distinguished only by their different functions", which shall exclude any form of hierarchy within the judiciary. This essential aspect is frequently overlooked by the documents of supranational institutions supporting the Italian model, which focus primarily on the potential threats to judicial independence coming from the executive power.[14]

While the institution of the CSM as an independent body was not disputed as such, its composition triggered an interesting debate within the Constituent Assembly. The project originally elaborated by the Commission for the Constitution provided for a mixed composition.[15] According to this project, the CSM comprised a number of members elected half by the judiciary and half by the Parliament as well as the President of the Republic serving as its President and two Vice-Presidents. The members elected by the judiciary are called 'gowned members' (*membri togati*), for they belong to the judiciary; the latter are called 'lay members' (*membri laici*), for they do not belong to the judiciary. However, during the discussion in the plenary of the Constituent Assembly, two opposite views measured against each other.[16]

On the one hand, some constituents opposed the project claiming that proper independence of the judiciary could be achieved only by full self-government of the judiciary. In their view, the presence in the CSM of lay members elected by the Parliament amounted to an interference by the legislative and executive powers on the judiciary. On the other hand, others upheld the project by stressing the need not to detach the judiciary from the society and not to release it from the system of checks and balances, and from the supervision of the Parliament in particular. In their view, a CSM consisting of magistrates only would have turned the judiciary into a 'closed caste'. These two positions reflected two different understandings of the principle of separation of powers. Those supporting the exclusion of lay members from the CSM adhered to a rigid conception of the separation of powers, aiming at avoiding any potential influence of the legislative and

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[13] See, in particular, the remarks of the Member of the Constituent Assembly Aldo Bozzi in the afternoon session of Nov. 6, 1947, in ATTI DELLA ASSEMBLEA COSTITUENTE 1803 (1947), available at http://legislatureprecedenti.camera.it/.

[14] Kosař, *supra* note 2, at 130.

[15] See Article 97, para. 2, of the draft Constitution elaborated by a Commission consisting of 75 Members of the Constituent Assembly and presented to the Presidency of the Constituent Assembly on 31 January 1948, available at http://legislatureprecedenti.camera.it/.

[16] These two opposing views are well summarized in the remarks of the Member of the Constituent Assembly Giuseppe Bettiol in the afternoon session of Nov. 7, 1947, in Atti della Assemblea Costituente, *supra* note 13, at 1849–1850. As to the reason bringing to refusing full self-government, see Simone Benvenuti, *Magistrature, in* COSTITUENTI OMBRA. ALTRI LUOGHI E ALTRE FIGURE DELLA CULTURA POLITICA ITALIANA NELLA STAGIONE DELLA COSTITUENTE 394 et seq. (Andrea Buratti & Maurizio Fioravanti eds., 2010).

the executive powers over the judiciary. By contrast, the supporters of a mixed composition stuck to a less strict reading of the separation of powers, which considers that all powers, including the judiciary, although separated, must be coordinated and be subject to the supervision of the democratic institutions.

A compromise was finally reached by decreasing the number of the lay members so that the gowned members were granted the majority within the Council. But the decrease of power of the lay members was balanced by requiring the CSM to choose its vice-president from among the lay members. While the influence of the lay members within the CSM was significantly curtailed with respect to the initial proposal, the idea of a strict self-government of the judiciary was rejected, and so the underlying idea of a rigid separation of the powers. While protected from undue influence by the executive and other powers, the judiciary is neither secluded from interaction and cooperation with other powers, nor is it unaccountable or detached from democratic controls. It is rather embedded in a system of checks and balances, from which no power can be exempted.

Firstly, JSG through the CSM is essentially *administrative* self-government. The CSM does not have the power to rule on the organization of the judiciary. It is a law-applying body, not a law-making one. The Constitution does not leave any room for doubt on this point. Article 105 requires the CSM to exercise its competences "in accordance with the rules on the organization of the judiciary", while Article 108, para. 1, reserves those rules for the Parliament. It is then the Parliament that has to lay down the rules on the judiciary, which are then applied by the CSM. This is essential to accommodate the autonomy of the judiciary with the democratic principle. Furthermore, as for all administrative bodies, the measures taken by the CSM do not escape judicial control. All CSM measures concerning the status of judges and prosecutors can be challenged before the administrative court in Rome, whose decisions are appealed before the Council of State.[17] This is quite a contentious issue, for the review performed by the administrative court is sometimes considered to be too intrusive.[18] Excesses aside, however, judicial review of its measures remains essential for embedding the CSM in a fabric of checks and balances, and in particular to protect the 'internal' judicial independence.

Secondly, as mentioned above, the CSM itself is not representative of the judiciary alone, but it also consists of members elected by the Parliament, from whom the vice-president is then chosen. Furthermore, the presidency of the CSM is given to the President of the Republic.[19] In practice, the President of the Republic very rarely presides over the CSM. But

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[17] Article 17 of Law 195 of 1958 (*infra* 23), as amended by Art. 4, Law 12 April 1990, n. 74. The measures concerning disciplinary responsibility are by contrast to be challenged before the Supreme Court.

[18] See LUCA GENINATTI SATÉ, IL RUOLO COSTITUZIONALE DEL C.S.M. E I LIMITI AL SINDACATO GIURISDIZIONALE DEI SUOI ATTI (2012).

[19] ARIANNA MORETTI, IL PRESIDENTE DELLA REPUBBLICA COME PRESIDENTE DEL CSM (2011).

his presidency is nevertheless extremely relevant to securing the balance among the powers. Being a *super partes* authority, detached and independent from the ruling political majority, the President of the Republic certainly contributes to securing the independence of the judiciary. But in his capacity of guarantor of the balance of powers, as designed by the Constitution, he can also help foster loyal cooperation among the institutions and redress potential abuses of power by the CSM itself.[20]

Thirdly, cooperation and mutual review are ensured between the CSM and the MJ. While the very institution of the CSM is meant to take away from the MJ those administrative powers that could affect judicial independence, the MJ still retains the political responsibility for the proper functioning of the administration of justice,[21] as will be stressed in Section C.I.1.

II. The Institutional Actors of Judicial (Self-)Government

If one moves from the constitutional to the sub-constitutional level, one will see that the CSM, whose legislative regulation has changed over time, is also embedded in a complex framework of judicial (self-)government. This comprises, besides the MJ, a set of other bodies established by ordinary laws.

According to constitutional provisions, the CSM is composed of three members by right: the President of the Republic, the First President and the General Prosecutor of the Supreme Court. Two-thirds of the remaining members are elected by all the magistrates and are magistrates themselves, the so-called gowned members. An important clarification is now needed. As the reader might have noticed, in this paper we always speak of "magistrates" and not of "judges". In Italy, public prosecutors indeed enjoy in principle the same degree of independence as judges and the careers of the two are not separated. A single recruitment procedure applies to both categories: a magistrate who has passed through the selection process chooses whether he or she prefers to work as a judge or as a public prosecutor. The CSM is meant to protect the independence both of judges and of public prosecutors and is responsible for the administration of the careers of both. The gowned members of the CSM are then either judges or public prosecutors ("magistrates").[22] The remaining third of the elective members are elected by the

[20] Cf. NICOLÒ ZANON & FRANCESCA BIONDI, IL SISTEMA COSTITUZIONALE DELLA MAGISTRATURA 19 (2008).

[21] See Article 110 of the Italian Constitution: "Without prejudice to the authority of the High Council of the Judiciary, the Minister of Justice has responsibility for the organization and functioning of those services involved with justice." Some scholars term this a system of 'dual governance', Francesco Contini & Antonio Cordella, *ICT e giustizia: successi e fallimenti tra legami deboli e governance duale, in* SOGGETTI SMARRITI. PERCHÉ INNOVAZIONE E GIUSTIZIA NON SI INCONTRANO (QUASI) MAI 52, 58 (Davide Carnevali ed., 2010).

[22] Law of 28 March 2002, n. 44, *Modifiche alla legge 24 marzo 1958, n. 195, recante norme sulla costituzione e sul funzionamento del Consiglio superiore della Magistratura*, established the election of ten judges by judges themselves, of four prosecutors by prosecutors, and of two magistrates of the Supreme Court.

Parliament in joint session from among full university law professors and lawyers with at least fifteen years of practice. The Council's term lasts four years and its members cannot be immediately re-elected. According to Article 105, the CSM 'has jurisdiction for employment, assignments and transfers, promotions and disciplinary measures concerning judges, in accordance with the norms governing the judiciary'.

Since the entry into force of the Constitution on 1 January 1948, the constitutional provisions on the CSM have not been amended. However, the Constitution confines itself to determining the proportion between the gowned and the lay members (2/1), but it does not regulate either the total number of Council members or how they must be elected. The legislature is accorded wide discretion in shaping the composition of the Council. As for the total number of members, this was initially set at twenty-four by Law no. 195 of 1958 (hereinafter: 'Law on the CSM'), which established the CSM, implementing the constitutional provisions no less than ten years after the entry into force of the Constitution.[23] The number was then increased to thirty-three in 1975 and finally reduced to twenty-seven members in 2002. The election of lay members was never disputed. The Law on the CSM provides that these are elected by the Parliament in joint session with a majority of 3/5 of the MPs, whereas after the second scrutiny a majority of 3/5 of the voting MPs is sufficient. This prevents the ruling majority from appointing 'its own candidates' because an agreement with the opposition is normally required, for the ruling majority alone generally cannot reach the 3/5 threshold. While this rule has never been amended, the electoral system for the gowned members has always been under dispute and was subject to no less than six amendments, which are analyzed in Section C.I.3.

From an organizational point of view, it would be a mistake to consider the CSM a homogenous body over time. When established in 1958, its secretariat counted six magistrates working full-time and a staff of seven employees. Nowadays, the CSM, which commands a budget of roughly 35 million Euros a year, counts approximately 230 employees. The secretariat comprises twelve magistrates, while six magistrates work at the internal service for study and documentation ('*Ufficio studi e documentazione*') established in 1990.[24] This gives an idea of the increasing complexity and institutional capacity of the CSM.

Other than the CSM, the Constitution only mentions one other actor responsible for judicial government, namely the MJ. In theory, the division of labor between the CSM and the MJ is sufficiently clear-cut. While Article 104 of the Constitution reserves to the CSM all

[23] Law of 24 March 1958, n. 195, *Norme sulla costituzione e sul funzionamento del Consiglio superiore della Magistratura*.

[24] Successive laws increased the size of the secretariat from six to eight in 1967, to twelve in 1977. As mentioned, the employees' staff witnessed an even sharper growth: twenty-four in 1967, ninety-six in 1977, up to slightly more than two-hundred in 1990.

measures concerning the status of the judges and their disciplinary responsibility, Article 110 charges the MJ with 'the organization and functioning of justice services'. This means that what potentially affects the independence of the judges – essentially the administration of their careers – belongs to the CSM, while it remains within the jurisdiction of the MJ to provide the services necessary to support the proper administrative functioning of the judiciary. In practice, however, this division of labor has proven far less clear-cut, as section C.I.1 will show.

Article 107, para. 2, of the Constitution enables the MJ to instigate a disciplinary proceeding against a magistrate, provided that the decision is reserved for the CSM, notably for its disciplinary section, consisting of the CSM vice-president and five members, four of whom are gowned members.[25] The MJ does not enjoy a monopoly on the instigation of a disciplinary proceeding, for the law has extended the same power to the General Prosecutor of the Supreme Court. The rationale of this power of the MJ is twofold. On the one hand, it relates to Article 110: being responsible for the proper functioning of the services related to justice, the MJ could instigate a disciplinary proceeding to redress those magistrates' behaviors that jeopardize the proper administrative functioning of these services.[26] On the other hand, the MJ's power to instigate a disciplinary proceeding proves the Constituent Assembly's purpose not to turn the judiciary into a closed corporation. The magistrates' behavior is not under the surveillance of the magistrates only, but it is also subject to the scrutiny of an actor that is external to the judiciary[27] and bears political responsibility before the Parliament.

The law confers to the MJ the authority to exercise 'high surveillance' on all judicial offices and on all judges. This consists of regular 'inspections' and specific 'administrative inquiries'. This inspection power, however, cannot affect either the independence of the judges in the exercise of their functions or the content of judicial decisions. Furthermore, it is worthy to note that supervision is carried out by the General Inspectorate of the Ministry of Justice, which is composed only of magistrates. Traditionally, magistrates also hold other key positions in the Ministry, such as heads of directorates and cabinets.

Except for the CSM and the MJ, the Constitution does not mention any other actor of judicial administration. After all, since all decisions concerning the status of the judges and their disciplinary responsibility have been centralized in the CSM, there is little room for other actors in the (self-)government of the judiciary. They can only play a consultative and

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[25] Notice that the disciplinary section enjoys wide autonomy within the CSM, for its decisions are final and not subject to review by the plenum. In its judgment of 2 February 1971, n. 12, the Constitutional Court upheld this by stating that the Constitution does not require that all competences of the CSM are to be exercised by the plenum: the legislature enjoys wide discretion in defining the CSM's organization.

[26] See Constitutional Court, judgment of 2 December 1963, n. 168.

[27] FRANCESCA BIONDI, LA RESPONSABILITÀ DEL MAGISTRATO. SAGGIO DI DIRITTO COSTITUZIONALE 246 (2006).

ancillary role to the CSM. This certainly helps to protect the 'internal' independence of the magistrates, releasing them from the influence, for example, of court presidents. However, it also burdens the CSM with a huge number of administrative tasks, and proposals have been made to decentralize the functions of the CSM.

As for court presidents, until 2006 they were appointed without a fixed term. In 2006, a four-year term, renewable one time, was introduced to avoid the consolidation of personal powers.[28] Their most significant role consists in assigning, in cooperation with the judicial boards, the court's magistrates to the civil or criminal branch and to the respective sections, and in assigning the cases to the court's sections and to the specific judges or colleges. The exercise of these powers, under the hierarchical control of the MJ before the establishment of the CSM, now envisages the participation of multiple actors. The President of the Court of Appeal, having heard the opinion of the judicial board, proposes to the CSM a list for approval. Then the cases are assigned to the sections and to the single judges or colleges by the court's president, according to general criteria previously approved by the CSM (the so-called '*sistema tabellare*'). Appeal to the CSM is granted against courts' presidents' decisions. This system is essential to secure the respect of the principle of the natural judge laid down by Article 24 of the Constitution. Court presidents also have a number of administrative tasks related to the organization and the management of the offices and participate in the process of evaluating judges.

In each district of an appeal court, there is a judicial board ('*consiglio giudiziario*') and a similar body exists for the Supreme Court ('*Consiglio direttivo della Corte di Cassazione*'). Judicial boards were first established in 1904,[29] became elective in 1946 and underwent significant reforms in 1966-67 and then again in 2006–2007 when their place was strengthened and their composition extended to advocates and law professors. They now consist of both elected magistrates of the relevant district and lay members, in a proportion of two to one, and are presided over by the President of the Court of Appeal. Their main powers consist in issuing reasoned opinions on the professional evaluations of magistrates and their promotion, for which the lay members can only submit their views, thus working as a source of information. Besides that, judicial boards also give their advice in the procedure for assigning judges and cases and supervise the functioning of the district's offices by referring to the MJ, if need be, any dysfunctionality they may detect.[30]

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[28] On the appointment procedure, *see infra* C.I.1.

[29] Royal Decree of 7 January 1904, n. 2, which transferred to the newly established boards the advisory powers previously belonging to court presidents on appointment, promotions and transfers.

[30] The law gave them also the power to make proposals to the School of the newly established School of the Judiciary, thus including them in the definition of traning policies.

Finally, in 2006, the competences concerning education and training were transferred from the CSM to the newly established, autonomous, High School of the Judiciary. The board of the High School consists of twelve members (seven magistrates, three professors, and two lawyers) partly appointed by the CSM (seven members) and partly by the MJ (five members). The establishment of a judicial school autonomous from the CSM responds firstly to the need to provide training open to the society, not confined behind the judicial walls.[31] But it also follows a European trend towards a better and more efficient training of judges.

C. The Impact of the Italian Model of Judicial Self-Government on the Independence and Accountability of the Judiciary

I. Consolidating External Independence at the Expense of Internal Independence?

1. Independence from the Executive

The constitutionalization of the CSM aimed first at insulating the judiciary from the executive power, and namely from the MJ. Yet, the law on the CSM was passed no less than ten years after the Constitution's entry into force. Thus, initially the MJ was able to exercise his influence, although senior magistrates, judicial boards, the old CSM, and courts presidents de facto co-determined some of his decisions, constraining the executive's power somewhat. Furthermore, the disciplinary power of the MJ was limited by a disciplinary court fully composed of senior judges.[32]

Once established, it took some time for the CSM to gain full autonomy from the MJ in the exercise of its powers. The Law on the CSM made all of this body's decisions conditional upon a previous proposal by the MJ, who was therefore in a position to influence the operation of the CSM. It was not until 1963 that the Constitutional Court held this provision unconstitutional for violating the autonomy of the CSM.[33]

Interestingly enough, in this decision, the Constitutional Court rejected a narrow reading of the powers of the MJ. Accordingly, Article 110 of the Constitution does not entrust the MJ only with the task of managing the administrative staff (clerks, secretaries and other employees), buildings, furniture, and other resources essential to exercise the judicial functions. It also empowers the MJ to organize courts and tribunals efficiently and to

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[31] Valerio Onida, *Perché la scuola della magistratura deve essere autonoma*, QUESTIONE GIUSTIZIA 1 (2016).

[32] Art. 236 of Royal Decree 12/1941 (*supra* note 5) and Art. 24 of Royal Legislative Decree 511/1946 (*supra* note 6).

[33] Judgment 168/1963 (*supra* note 26). The CSM was thus recognized as having the power to initiate the procedure independently.

secure their functioning. This means that, while any influence of the executive on the status of magistrates must be ruled out, overlaps between the powers of the CSM and of the MJ in the management of the judicial machinery are unavoidable, and the two have to loyally cooperate for the sake of the proper functioning of the judicial services. The appointment of court presidents is a case in point that testifies to this need for cooperation.

Since the appointment as a court president is clearly an important step in a judge's career and can bear direct consequences on courts' decisional output, there is no doubt that the relevant power belongs to the CSM. However, since court presidents perform not just purely judicial functions but also those related to court administration and organization, the MJ must be given a say in the appointment procedure. Otherwise, the MJ, who is in charge of the proper administration and functioning of the judicial machinery, would be accountable before the Parliament for the administrative deficiencies ascribable to court presidents, whom the MJ did not contribute to choosing and cannot remove. Article 17 of the Law on the CSM strikes a balance between the need to secure judicial independence and the need to respect the constitutional prerogatives of the MJ – a balance between Article 105 and Article 110 of the Constitution. It provides that the appointment of court presidents is decided upon by the CSM based on a proposal made by an internal commission 'in concert' with the MJ. However, what 'in concert' exactly means is anything but clear.

Frictions between the MJ and the CSM for the appointment of court presidents materialized in particular at the beginning of the 1990s, when the MJ refused to follow up the appointment of the President of the Court of Appeal of Palermo, for he had not agreed on the proposal made by the commission, which had been approved by the CSM. The conflict was decided by the Constitutional Court. In its view, the commission and the MJ must engage in a real dialogue in accordance with the principle of loyal cooperation. If an agreement cannot be reached, the CSM can then select a candidate who lacks the support of the MJ, provided that it gives reasons for departing from the MJ's view. The Court thus ruled out a veto power of the MJ, although the intervention of the MJ must be considered something more than simply consultative.[34] The Constitutional Court reiterated in 2003 that the CSM must truly and fairly seek an agreement: therefore, concert relates to the procedure and the method by which the choice is made, not the final outcome of the decision.[35]

Taking a bird's eye view, it is widely recognized that independence from the executive – of both the judiciary and individual judges – has been progressively and substantially achieved also in its output dimension. This does not rule out in principle the possibility for

[34] Constitutional Court, judgment of 9 July 1992, n. 379.

[35] Constitutional Court, judgment of 18 December 2003, n. 380.

the MJ to unduly influence the functioning of the judicial machinery by resorting to its Article 110 powers or through its own normative powers or those delegated to the Government by the Parliament. In that respect, the National Association of Magistrates raised on several occasions the potential negative impact of inadequate resources on the efficient and independent functioning of the judicial machinery.[36]

2. Independence from the Legislative

The same assessment holds true if one turns to the legislative branch as the second constitutional power able to encroach on judicial independence. The judiciary is not completely insulated from the legislative branch since, as mentioned in Section B, the Parliament holds the power to define the legislative framework in which judicial administration bodies operate, to decide the judiciary's budget and overall structure, and also participates in judicial government by electing 1/3 of the CSM members. Even though Parliament's representatives are only one third among all appointed members, one of them holds the vice-presidency. Yet, the ability of non-judicial members to play a role very much depends on their profile and on the CSM's internal dynamics. Between 1958 and 1976, their profile was strongly political, while between 1976 and 1994 a more neutral character emerged, seemingly related to greater autonomy of the CSM.[37] After 1994, the profile of lay members tended to politicize again. As to the internal dynamics, power relations depend on the ability of gowned members to coordinate and on the ability of the vice-president to exploit divisions among them or to determine the CSM agenda, as happened between 2014 and 2018.[38]

In any case, members elected by the Parliament are a minority and they rarely act in concert. Therefore, the Parliament and even less so the parliamentary majority is hardly able to affect the independence of individual judges in the process of appointment, promotion, etc. By contrast, an influence in the opposite direction, from the judiciary to the Parliament, can be observed. Indeed, the judiciary has been strong enough to lobby the legislative bodies, thus influencing limited aspects of the legislative framework. For

[36] See for example the intervention of the Prosecutor of the Court of Appeal of Milan on the occasion of the opening of the judicial year in January 2016, <http://www.radioradicale.it/scheda/465315/milano-cerimonia-di-inaugurazione-dellanno-giudiziario-2016>.

[37] DANIELA PIANA & ANTOINE VAUCHEZ, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA 142 et seq. (2012).

[38] This explains the battles over the election of the vice-president and those addressing the balance between the powers of the plenum and the powers of the vice-president (and of the President). SIMONE BENVENUTI, IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA FRANCESE. UNA COMPARAZIONE CON L'ESPERIENZA ITALIANA 26 et seq. (2010).

example, under the pressure of judicial initiatives, magistrates' salaries, pensions, and retirement bonuses were substantially increased in 1984.[39]

The CSM too was able to influence legislation. For example, in 1979 it failed to organize autonomously the written and oral exams that new magistrates had to pass two years after their entry in the judiciary. Urged by the CSM, the Parliament subsequently abolished these examinations.[40]

3. Old and New Forms of Internal Independence

In sum, the institutional framework and its de facto functioning guarantee a high degree of external independence both of the judiciary as a whole and of single judges. However, the problem of internal independence was less easily solved.

The establishment of the CSM in 1958 did not immediately challenge the undue influence senior magistrates used to exercise on junior colleagues. The Law on the CSM reserved to Supreme Court magistrates six of the fourteen elective positions.[41] If one considers that the first President and the General Prosecutor of the Supreme Court are members by law, it appears that half of the gowned members of the CSM were magistrates of the Supreme Court. Besides distorting the representative nature of the CSM – for Supreme Court judges comprised, and comprise, clearly far less than half of the magistrates – this significantly put into question the internal aspect of judicial independence by giving an extremely influential role to senior magistrates over the career of their younger colleagues.

This situation changed substantially with reforms of the balance between senior and younger magistrates, which reflected a process of democratization of the judiciary.[42] Law no. 695 of 22 December 1975, among others, raised the number of CSM members and slightly redressed the balance in favor of younger magistrates.[43] Law no. 1 of 3 January 1981 considerably reduced the number of seats reserved for high magistrates[44] and Law

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[39] Giuseppe Di Federico, *Costi e implicazioni istituzionali dei recenti provvedimenti giurisdizionali e legislativi in materia di retribuzioni e pensioni dei magistrati*, 35 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 331 (1985); FRANCESCA ZANNOTTI, LA MAGISTRATURA, UN GRUPPO DI PRESSIONE ISTITUZIONALE. L'AUTODETERMINAZIONE DELLE RETRIBUZIONI 154 (1989).

[40] Di Federico, *supra* note 39. This decision was justified by the concern for greater individual independence of young magistrates.

[41] Article 23 of the Law on the CSM. In its judgment 168/1963 (*supra* note 26), the Constitutional Court refused to hold this provision unconstitutional; in its view, the overrepresentation of Supreme Court magistrates was a legitimate choice of the legislature, in view of the longer experience of these high magistrates.

[42] For an overall analysis, GIAMPIETRO FERRI, MAGISTRATURA E POTERE POLITICO. LA VICENDA COSTITUZIONALE DEI MUTAMENTI DEL SISTEMA ELETTORALE E DELLA COMPOSIZIONE DEL CONSIGLIO SUPERIORE DELLA MAGISTRATURA (2005).

[43] Article 3 of Law 695/1975.

[44] Article 15 of Law 1/1981.

no. 74 of 12 April 1990 finally limited the positions of elected Supreme Court magistrates to only two,[45] so that the problem of the predominance of senior magistrates within the CSM can now be considered definitively overcome. Table 1 visualizes the progressive decrease of the predominant role of Supreme Court magistrates within the CSM.

Table 1: Ratio of Supreme Courts Magistrates within the CSM (1958-2002)

	CSM Members, including de jure members	Supreme Court Magistrates out of CSM Gowned Members*	% of Supreme Court Magistrates out of Gowned Members*	% of Supreme Court Magistrates within the CSM**
1958	24	8/16	50%	35%
1975	33	10/22	45%	31%
1981	33	6/22	27%	19%
1990	33	4/22	18%	13%
2002	27	4/18	22%	15%

**Gowned members include also 2 de jure members.*
*** Reported features do not take into account the Head of State, who rarely presides over the CSM and does not cast a vote.*
(Sources: Law 195 of 24 March 1958; Law no. 695 of 22 December 1975; Law no. 1 of 3 January 1981; Law no. 74 of 12 April 1990; Law no. 44 of 28 March 2002)

While legislative reforms have proven successful in contrasting the undue influence of senior magistrates over younger ones, no legislative reform aptly addressed what is now considered the main threat to judicial internal independence, i.e. the power of the 'correnti'. These are organizations acting within the association that groups together all Italian magistrates, the National Association of Magistrates ('*Associazione Nazionale Magistrati* – ANM'). The ANM, which was established in 1944 as a successor to the General Association of Magistrates,[46] acts as a forum in which judges discuss judicial policies.[47] Initially, senior magistrates ruled the ANM. However, in 1957 a new generation of magistrates gained the leadership and alienated the senior magistrates from the ANM. Starting from the 1960s, the process of institutionalizing these groups of magistrates

[45] Article 5 of Law 74/1990.

[46] The Associazione Generale dei Magistrati d'Italia (AGMI) was founded in 1909 and had over 2,000 associate members in 1914, for a judicial body comprising between 4,000 and 5,000 magistrates. It was banned in banned in 1926, Royal Decree of 16 December 1926. See Pizzorusso, *supra* note 7, at 55–60; Antonella Meniconi, *La storia dell'associazionismo giudiziario: alcune notazioni*, 4 QUESTIONE GIUSTIZIA 220, 223–4 (2015).

[47] Carlo Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy*, 3 REPRESENTATION 347, 350 (2013). On the relevance of '*correnti*' for understanding the development of the Italian judicial organisation, *see* ALESSANDRO GIULIANI & NICOLA PICARDI, LA RESPONSABILITÀ DEL GIUDICE 154 et seq. (1995).

brought about the formal establishment of the 'correnti', whose role within the CSM was magnified by, among other things, legislative reforms of the electoral system.

When the CSM was established in 1958, magistrates could vote only for candidates belonging to their own category.[48] Magistrates from the Supreme Court elected six representatives in one single nation-wide constituency, while magistrates from the Court of Appeal and from the Tribunal elected four representatives each, in four different constituencies (one per constituency).[49] Law 1198/1967 abandoned the category-based system of representation established by the Law on the CSM. Magistrates thus voted for candidates from all three categories within one national constituency.[50] The candidates of the Supreme Court had therefore to seek the support of lower ranking magistrates in order to be elected.[51]

Law no. 695 of 22 December 1975 replaced the majority principle with a system of proportional representation. Elections were held within a single nation-wide constituency based on lists that included candidates from any category in the amount of those to be elected.[52] *De facto*, this required the presentation of lists of candidates with the support of nationally structured organizations such as 'correnti', which were only able to support the CSM's candidates at the national level. Lists therefore came to be determined by the secretariats of the 'correnti'.

The 1967 and 1975 electoral system reforms emancipated lower magistrates from top magistrates and provided the CSM with a substantively pluralist structure that was reflected in their decision-making dynamics. Pluralism was supposed to originate from the proportional representation of the socially and ideologically fragmented judiciary. The potential diversification of CSM judicial members was thought to allow for mutual checks and balances among the representatives of the ANM's 'correnti' in the CSM and thus to improve the CSM's decision-making autonomy.

Over the years, however, 'correnti' became an actor potentially undermining independence in two ways. Although not explicitly linked to a specific political party,

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[48] Article 23 of the Law on the CSM.

[49] Articles 26 and 27 of the Law on the CSM.

[50] Articles 7 and 9 of the Law on the CSM.

[51] However, Article 8 of the law somehow tempered the departure from the category-based logic since candidates themselves for each category were first chosen (twice the number of members to be elected) through elections according to the old system for electing members of the CSM. Magistrates from the Supreme Court elected twelve candidates in one single constituency, while magistrates from the Court of Appeal and from the Tribunal elected eight representatives each in four different constituencies (two per constituency).

[52] Article 5 of Law 695/1975. Lists needed to be signed by at least 150 voters.

'correnti' distinguish themselves for their 'political' or 'ideological' orientation, so that it is common to speak of moderate, progressive, conservative 'correnti'. These factions each drafted candidate lists with the intent of taking their candidates to the CSM. Thus it was a candidate's affiliation and loyalty to a 'corrente', rather than merit, which was responsible for his or her election. Second, the practice of CSM decision-making, especially in the area of appointments, developed in such a way as to achieve informal agreements among 'correnti' to share vacant positions within the judiciary amongst themselves.[53] This affected the legitimacy of the measures taken by the CSM, which are often criticized as biased, for they do not aim at rewarding the best magistrates for given positions, but rather those showing certain loyalties. These supposedly negative effects became apparent and the object of criticism in the political arena during the 1980s, which led to new reforms.

While keeping the proportional system of representation, Law no. 74 of 12 April 1990 replaced the nation-wide electoral district with four territorial districts and lowered the number of magistrates required to support the presentation of a list of candidates.[54] The purpose was to favor territorial rather than politico-ideological representation in order to de-structure the 'correnti' and to reduce the council's politicization. However, the law introduced a 9% electoral threshold computed at the national level for the allocation of seats to lists in territorial districts. This had the effect of stabilizing the existing equilibrium among the major, already existing 'correnti', thereby limiting internal pluralism.[55]

Lastly, Law no. 44 of 2002 abolished the system of proportional representation without escaping the criticism of inconsistency.[56] On the one hand, it requires the candidate to run for election as a single candidate and does not allow candidates to group in a list, as required by the previous regulation.[57] At least in theory, this should support candidacies of autonomous magistrates, i.e. those not connected to a particular 'corrente'. On the other

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[53] Giuseppe Di Federico, *«Lottizazioni correntizie» e «politicizzazione» del C.S.M.: quali rimedi?*, 10 QUADERNI COSTITUZIONALI 279, 284 & 289 et seq. (1990); Carlo Guarnieri, *Origini, problemi e sviluppo delle «correnti giudiziarie»', in* I MAGISTRATI E LE CORRENTI. ALLA RICERCA DELL'INDIPENDENZA DA SE STESSI 17, 18–20 (Antonio Beveri ed., 2008).

[54] The four territorial districts were determined by unifying courts of appeal through drawing lots. Only the two Supreme Court magistrates were elected within a national district. The number of signatures required to support a list of candidates was 50 for the election of the two Supreme Court magistrates within the national district and 30 for the election of other representatives within the four territorial districts. See Articles 6 and 7 of Law 74/1990.

[55] Pizzorusso, *supra* note 7, at 43.

[56] This law also provides that, besides the two magistrates of the Court of *Cassazione* four seats are reserved for prosecutors and ten seats for judges, Article 5 of Law 44/2002.

[57] Article 7 of Law 44/2002. Single candidacies need the support of a minimum of 25 magistrates and a maximum of 50 magistrates.

hand, the law provides that all candidates run in a single national constituency, and not in four smaller constituencies as in the previous law.[58] But it is very difficult for an autonomous candidate to find sufficient support nationwide without the support of nationwide organizations such as the 'correnti'.[59] Yet, for some, the 2002 reform might attenuate the grip the secretariats of the 'correnti' had on the candidacies, thereby allowing the election of 'independent' candidates.[60]

Following this description, two main conclusions hold. First, issues of internal institutional independence are not alien to the Italian judicial system, especially as regards the powers related to the magistrates' status. Whether this has relevant consequences on output independence is an open issue that has not been empirically investigated, even though Italian magistrates seem to perform adequately in terms of independence.[61]

Second, the Italian legal scholarship agrees on considering the principle of pluralism – reflected in the CSM's structure and decisional dynamics – as a guarantee of (institutional) independence.[62] Pluralism primarily concerns the structure of the CSM at large. First, it is finely balanced by assigning the presidency to the Head of State and appointing a lay member as vice-president of a body composed of a majority of magistrates. It also concerns the gowned and the lay components *per se*. It therefore results from the constitutional and legal provisions first, but also from the social conditions of the judiciary and the political contexts. The CSM's pluralist structure is essential to its proper functioning since, from a normative perspective, this prevents any principal to take control of the decision-making process.[63] Put differently, the principle of independence is not exclusively related to JSG *per se*, which rather matters for the structural insulation of the

[58] Article 5 of Law 44/2002.

[59] Among the objectives of the law was the alignment of the election of the judicial members of the council to the system for the election of members of Parliament, and thus to achieve systematic coherence with provisions regulating the formation of the legislative branch. However, it is difficult to see why the CSM's judicial members' electoral system needed fine-tuning to make it correspond with the electoral system of Parliament, as the two bodies had different goals. In connection to this, the law aimed at facilitating the formation of stable majorities within the CSM, but, again, this objective was open to criticism, as there is no real need for stable majorities in the CSM as there is in parliamentary bodies.

[60] Recorded interview by Simone Benvenuti with a member of the CSM, 17 May 2018.

[61] tential trickledown effects on output independence.

[62] Paolo Ridola, *La formazione dell'ordine del giorno fra poteri presidenziali e poteri dell'Assemblea, in* MAGISTRATURA, CSM E PRINCIPI COSTITUZIONALI 66 (Beniamino Caravita ed., 1994).

[63] Kosař, *supra* note 2, at 410.

judiciary. For the individual independence to be satisfied (theoretically, also in its output dimension), the pluralist structure of the JSG body is essential.[64]

II. Moderately Accountable Judges within the Least Accountable Branch?

In European constitutionalism, judicial independence traditionally eclipsed judicial accountability. Yet, the importance of judicial accountability is now extensively acknowledged in academic scholarship.[65] The Consultative Council of European Judges (CCJE), long at the forefront of promoting judicial independence, also issued an opinion on the legitimacy and accountability of the judiciary.[66] In Italy, no constitutional provision explicitly refers to the accountability of judges, as opposed to other civil servants.[67] Yet, mechanisms relating to career, such as appointments and promotions, and to the disciplinary process mentioned in Articles 105 and 107 of the Constitution imply an accountability relation that is defined concretely by the bodies in charge of such areas of judicial government.[68] Debates within the Constituent Assembly also show that the creation of the judicial council was related to accountability issues.[69] To be sure, the problem of judicial accountability has never been alien to Italian legal scholars.[70]

At the outset, following the description in sub-Section C.I, one cannot but stress three shifting dimensions of accountability between the 1950s and the 1980s: first, the

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[64] The important individual guarantees for judges established by the Constitution to that effect also witness that the problem of independence was understood in much broader terms than JSG. For example, the Constitution set out the principle that "Judges are subject only to the law" (Article 101), the principle of the legal judge ("giudice naturale", Article 25.1), the rule of irrevocability (Article 107.1) and the equality of all judges (Article 107.3).

[65] Francesco Contini & Richard Mohr, *Reconciling independence and accountability of judicial systems*, 2 UTRECHT LAW REVIEW 26 (2007); DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE (2010); Kosař, *supra* note 2, at 14.

[66] CCJE, Opinion No. 18 (2015), *The position of the judiciary and its relation with the other powers of state in a modern democracy*. The Consultative Council of European Judges (CCJE) is an advisory body of the Council of Europe on issues relating to the independence, impartiality and competence of judges. It is composed exclusively of judges.

[67] See Article 97 of the Italian Constitution. However, Article 28 provides that any civil servant is liable under criminal, civil and administrative law for acts in breach of individual rights.

[68] On the conceptualization of judicial accountability for the purpose of this article, see Simone Benvenuti, *The Politics of Judicial Accountability in Italy: Shifting the Balance*, 14 EUROPEAN CONSTITUTIONAL LAW REVIEW 369 (2018).

[69] Benvenuti, *supra* note 16, at 385.

[70] See Giuseppe Volpe, *Sulla responsabilità politica dei giudici*, *in* SCRITTI IN ONORE DI COSTANTINO MORTATI. ASPETTI E TENDENZE DEL DIRITTO COSTITUZIONALE 809 (Egidio Tosato ed., 1977); Mauro Cappelletti, *Who Watches the Watchmen? A Comparative Study on Judicial Responsibility*, 1 AMERICAN JOURNAL OF COMPARATIVE LAW 1 (1983); VINCENZO VIGORITI, LA RESPONSABILITÀ DEL GIUDICE (1984), and literature referred to. More recently, see Biondi, *supra* note 27, and LA RESPONSABILITÀ DEI MAGISTRATI (Mauro Volpi ed., 2008).

weakening of external accountability and the strengthening of internal accountability; second the disempowering of the rather uniform group of top judges in favour of associated rank-and-file judges represented in the CSM; third, the prevalence of loyalty and ideology-based accountability over merit-based (professional) accountability. This had consequences on accountability as a virtue and the emergence of new professional models within the judiciary.[71] The highlighted trends also explain those reforms aimed at reducing the grip of judicial associations and balancing the prevailing internal dimension of accountability.

To complete this picture, this sub-Section addresses three more specific dimensions of accountability. These relate to accountability shortcomings in the assessment and promotion of judges, to the characteristics of disciplinary responsibility, and to the recent commitment of the CSM towards greater openness in different areas of JSG. While the first two display the weaknesses of judicial accountability in the Italian system, the latter one testifies to an opposite trend towards its enhancement, especially towards external actors.

1. The Lack of Accountability in Assessment and Promotion and the Attempts to Improve Professional Accountability

A crucial aspect of judicial accountability in Italy is its reduced status in the area of magistrate assessment and promotion. Article 107, para. 3, of the Constitution provides that '[m]agistrates are distinguished only by their different functions'. A broad interpretation of this provision has since the mid-1960s led to the abolition of judicial ranks. These were formally replaced by the *functional* distinction between magistrates of tribunal, appeal, and cassation. Consistently, subsequent legislative reforms abolished competitive examinations-based promotion and allowed qualification for a specific function beyond the availability of corresponding positions.[72] Thus, a magistrate could become magistrate of appeal while retaining the same lower position as judge or prosecutor of a tribunal; among other things, this involved a salary increase.[73] Within such a system, promotion to "higher" qualifications (functions) was based on the seniority

[71] Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 WEST EUROPEAN POLITICS 946 (2010); ANTOINE VAUCHEZ, L'INSTITUTION JUDICIAIRE REMOTIVÉE. LE PROCESSUS D'INSTITUTIONNALISATION D'UNE "NOUVELLE JUSTICE" EN ITALIE (1960–2000) (2004); Piana & Vauchez, *supra* note 37, at 129 et seq.

[72] This is known as system of 'open positions' ('ruoli aperti'), Pizzorusso, *supra* note 7, at 45–50.

[73] Following the judgment of the Constitutional Court of 19 May 1982, n. 86, it was not possible to be appointed as a judge of cassation without exercising the relevant functions, but magistrates were qualified for appointment and relative salary benefits were preserved.

principle, following the assessment of professional merits by court presidents and local judicial councils and a decision by the CSM[74].

In its practical implementation, the new framework ended up entailing automatic promotions. The seniority rule indeed prevailed over merit-based criteria in the assessment activity, which did not take place on a regular basis. Scholars described this system succinctly as 'promotion without demerits' since the promotion was blocked only in cases of evident faults.[75] From 1979 to 2007, only 0.4% to 0.9% of magistrates received a negative assessment, usually those subject to disciplinary sanctions or to criminal charges.

This system emancipated magistrates from the judicial hierarchy, however, it generated side effects in the long run. First, inadequate assessment allowed for greater discretion of the CSM in making appointments to specific functions.[76] In the course of the past 35 years, Italian magistrates have increasingly realized that their aspirations in those matters must of necessity be cultivated through personal ties with the decision makers and more particularly with their colleagues elected to the CSM as representatives of one of the 'correnti' of the National Association of Magistrates. For this very reason, almost all magistrates become members both of the ANM and of one of its 'correnti'. Membership is often a decisive factor in obtaining the desired decisions. Second, accountability in the advancement to higher qualifications (functions) was severely weakened in favoring automatism.

This blatant example of accountability perversion[77] explains attempts by the legislator to increase professional accountability and to counter corporatist assessment. The Parliament approved two general reforms between 2005 and 2007.[78] While maintaining the seniority rule for advancement, the 2005 law introduced a merit-based assessment through written and oral examinations for promotion to a higher function. The 2007 law improved the system by introducing a regular evaluation process.[79] During the first 28 years of a judge's

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[74] Thirteen years' experience is required to become a judge of appeal and 28 years to become a judge of cassation. Law no. 392 of 24 May 1951, Law no. 570 of 25 July 1966 and Law no. 831 of 20 December 1973. Evaluation is a task of local judicial councils. It is based on observations by the court president and is subsequently approved by the CSM, see Article 3 of Law no. 570 of 25 July 1966.

[75] Giuseppe Di Federico, *Statuto, carriera e indipendenza dei magistrati ordinari in Italia*, 1 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1577, 1589 (1973); *see* also GAETANO SILVESTRI, GIUSTIZIA E GIUDICI NEL SISTEMA COSTITUZIONALE 162–169 (1997); Guarnieri, *supra* note 47, at 350. This is a notable example of simulated judicial accountability, Kosař, *supra* note 2, at 70.

[76] Guarnieri, *supra* note 47.

[77] Kosař, *supra* note 2, at 70.

[78] Legislative Decree n. 160 of 5 April 2006, and Law no. 111 of 30 July 2007, n. 111.

[79] Article 2 of Law no. 111/2007, amending Article 11 of Legislative Decree n. 160/2006.

career, the CSM now formulates a reasoned assessment every four years. Negative assessment can involve the obligation to attend a training course, re-appointment to a different position, and even being forbidden from exercising certain functions. Furthermore, judges cannot hold the same position for more than ten years. The law also created a commission made up of magistrates, university professors, and qualified lawyers to assist the CSM in assessing the scientific analytical competencies and skills necessary to be appointed as a Supreme Court magistrate.[80]

Overall, these reforms, which were approved by a center-right (2005) and a center-left (2007) majority respectively and witnessed a coincidence of intents on these aspects, did not change the JSG structure but the way JSG powers are exercised; nevertheless, they had limited impact due to inherent limits and internal resistance against implementation. From 2008 to 2016, 2% of magistrates received negative assessments.[81] The fact that assessing authorities (court presidents and judicial boards) are only composed of magistrates of the same district may explain this.[82] The new system of assessment proved especially problematic as regards the court presidents, due to insufficient predefinition of the assessment criteria.[83]

2. A Weak Disciplinary Responsibility?

The disciplinary accountability framework involves the collaboration of the three state powers:[84] the MJ initiates the procedure based on the general framework for disciplinary offenses and procedural guarantees set by the Parliament, while the disciplinary section of the CSM is in charge of the disciplinary decisions. However, in the original framework the nature of the proceeding – administrative or judicial – was ambiguous. Only in a 1971 decision did the Constitutional Court explicitly acknowledge its judicial nature.[85] The Constitutional Court stated that the disciplinary section is equivalent to a court (which

[80] See Article 12, subsection 13, of Legislative Decree n. 160 of 5 April 2006.

[81] Valutazioni dal 2008 al 2016 – Dettaglio per esito http://www.csm.it/documents/21768/137951/Valutazioni/06706f39-ce6a-432c-bea2-45726330b9a4.

[82] Claudio Castelli, *Commissione ministeriale per l'ordinamento giudiziario: più di un semplice maquillage, non ancora un progetto. Il punto di vista di un partecipante ai lavori*, QUESTIONE GIUSTIZIA (2016). The activity of judicial boards in other areas, where non-judges indeed participate, increased both in quantity and in quality. Gianluca Grasso, *Note introduttive*, in Gianluca Grasso (ed.), *Dieci anni di riforme dell'ordinamento giudiziario*, V FORO ITALIANO 158 (2016).

[83] Grasso, *supra* note 82, at 223 et seq. and cited bibliography. The CSM approved new rules in 2015 (*Testo Unico sulla dirigenza giudiziaria*) and new rules of procedure in September 2016. Their impact is still difficult to assess.

[84] MICHELE VIETTI, L'ORDINAMENTO GIUDIZIARIO 60 (2003).

[85] Judgment of 2 February 1971, n. 12.

explains the appeal to the Supreme Court, which decides upon it in joint session)[86] and that 'the law, through explicit and unambiguous provisions, conferred jurisdictional character to the function carried out by the disciplinary section.'[87]

Nevertheless, the disciplinary proceeding did not fully comply with the requirement of a fair trial. First, hearings were not public: the CSM did not introduce the possibility of public hearings until 1985, and a law formalized the principle of public hearings only in 1990.[88] Even more important, disciplinary offenses have not been clearly defined by law until recently. Article 18 of the Royal Decree n. 511 of 1946 merely provided that a judge may be disciplined when he or she fails to maintain the duties of the office, shows untrustworthy and/or inconsiderate behavior, or damages the reputation ('*prestigio*') of the judiciary.[89] In theory, such vagueness conflicted with Article 107, para. 1 of the Constitution, which states that a judge may be suspended or assigned to a different position following a 'decision taken based on rules set by a law'.[90] In practice, even the most serious breaches of professional competencies, unless externally disclosed, were considered irrelevant, contrary to minor breaches that could harm the prestige of the judiciary.[91]

The disciplinary section of the CSM had to fill in these very vague concepts (duties of the office, untrustworthy behavior, reputation of the judiciary) through its own opinions.[92] This had two consequences. First, the normative and the jurisdictional dimensions *de facto* blurred within the disciplinary section, seriously undermining its impartiality.[93] Second, the consensus among 'correnti' represented in the disciplinary section favored loose

[86] Article 17 of the law on the CSM.

[87] In this decision, the rule of in camera hearings and the diminished role of the advocate were at stake, among other matters; notwithstanding its clear position, the Court considered these two constitutional questions unfounded.

[88] Article 1 of law 74/1990, which maintains the possibility of exceptions.

[89] This decree was adopted before the Constitution and envisaged a disciplinary court and disciplinary tribunals, jurisdictional in character, thus reforming the previous system based on a politico-bureaucratic understanding of disciplinary responsibility, Vietti, *supra* note 84, at 52.

[90] The Constitutional Court, however, upheld this provision, despite its vagueness: see judgment of 8 June 1981, n. 100.

[91] Zanon & Biondi, *supra* note 20, at 282.

[92] The plenary of the CSM also contributed to define disciplinary offences by resorting to its 'para-normative' powers.

[93] Vietti, *supra* note 84, at 54 et seq.. Hence, while the disciplinary system is no longer based on the old bureaucratic approach, many commentators have underlined its practical shortcomings, Zanon & Biondi, *supra* note 20, at 328.

definitions of disciplinary offenses, making the system ineffective and causing disciplinary responsibility to go underused.

In reaction, the Italian Parliament somewhat formalized the definitions of disciplinary offenses in 2005 and 2006. It is noteworthy that this was also the consequence of a 2001 ECtHR decision, which criticized the lack of foreseeability of disciplinary offenses.[94] The law also increased the MJ's powers for the procedures in disciplinary investigations and indictments.[95] In turn, it addressed the 'juridicisation' of disciplinary procedure, regarding the right to defense and the public viewing of hearings, canceling all traces of a typical bureaucratic form of jurisdiction.[96]

Reform in 2006 had a seemingly limited impact though.[97] A bureaucratic approach still prevails in inspections and supervision activities, and sanctioning formal faults supposedly fosters among magistrates an approach to the judicial work that is not favorable to substantive quality. Magistrates of the General Prosecutor's office conduct the investigations and act as prosecutors in front of the Disciplinary Commission. Generally, magistrates seconded to the General Inspectorate of the Ministry also perform investigation activities. In this respect, disciplinary responsibility mostly manifests in its internal dimension.

This is confirmed by the practice. A glance at the quantitative dimension shows that the majority of disciplinary actions are taken by the General Prosecutor[98]. It is worth stressing that between 2007 and 2016, more than 1400 presumed disciplinary offenses on average per year have been reported to the General Prosecutor, who initiated the procedure in less than 8% of the cases. Sanctions have been imposed in slightly more than 25% of the initiated cases, mostly relating to delays. Only 4% sanctions have been of a certain

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[94] ECtHR 2 August 2001, case no. 37119/97 *N.F. v. Italy*. Article 1(1) and 2(6-7) of Law no. 150/2005 and Articles 2, 3 and 4 of Legislative decree n. 109/2006 introduced three categories of disciplinary offences depending on whether they have been committed during or outside the exercise of the judicial functions and whether they result from committing a crime.

[95] See notably Article 2(6) of Law no. 150/2005 and Articles 1–4, 14, and 17 of Legislative Decree n. 106/2006.

[96] Zanon & Biondi, *supra* note 20, at 317–321; Giuliani & Picardi, *supra* note 47, at 149. 'Legalisation' of accountability implies the reliance on stricter legal standards, Kosař, *supra* note 2, at 38.

[97] Castelli, *supra* note 82. Data show that between 2008 and 2012 on average 150 disciplinary proceedings have been initiated each year, 25% on the initiative of the MJ and a large share in relation to delays. Disciplinary sanctions are imposed in slightly more than 10% of the cases.

[98] Between 2008 and 2012 31% of disciplinary proceedings on average (50 per year on a total of 157) were instigated by the Ministry. Claudio Castelli, *Un sistema disciplinare da correggere, liberiamo i magistrati dalla paura*, QUESTIONE GIUSTIZIA (2013).

gravity.[99] For instance, in 2016 there were 156 disciplinary actions on 1,363 reported offenses, leading to 51 sanctions. Only three of those entailed the highest sanction, i.e. removal from office, and only three the second most harmful, loss of seniority. To be fair, there is disagreement on how to interpret these features. For some commentators, a limited number of sanctions indicates a working system that *prevents* disciplinary offenses while the high features of initiated procedures – partly on the initiative of the MJ – witness continuous disciplinary supervision. For some others, the features are rather satisfying, while the problem mostly lies in the fact that disciplinary proceedings make up for the deficiencies of other types of accountability, such as professional assessment and civil liability.[100]

3. Judicial Accountability Towards the Public and the Recent Commitment to Greater Openness and Transparency

Openness and transparency are important in favoring effective accountability to different audiences. Compared to ministerial structures, the CSM – a mixed body, where the judiciary and the civil society are represented in a pluralist manner and whose activity is public – inherently favors overt discussion and ensures a certain porosity of the judicial machinery to the outer societal environment.[101] The creation of a collegiate body also cements the idea of elevating the accountability framework. This indicates that cognitively framing the CSM in terms of independence conceals one of the CSM main virtues and reasons for its establishment, i.e. the ability to reflect optimal accountability rationales. Besides this, other devices that broadly relate to JSG are also important to secure openness and transparency. In the opening ceremonies of the judicial year, court presidents publicly address problems of the judiciary that are widely publicized by the media.[102]

While openness potentially and actually favored by JSG bodies cannot be refuted, corporatist logics did not go in the same direction. This is particularly true in the area of

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[99] Procura Generale della Corte Suprema di Cassazione, *Statistiche relative all'attività della Procura generale in materia disciplinare*, https://www.csm.it/documents/21768/2100643/intervento+procuratore+generale+inaugurazione+anno+giudiziario+2017+seconda+parte.pdf/4a374305-a855-3990-1eb4-c1a32d2971de; Procura Generale della Corte Suprema di Cassazione, *Statistiche relative all'attività della Procura Generale in materia disciplinare* http://www.cortedicassazione.it/cassazioneresources/resources/cms/documents/Relazione_statistica_proc_gen.pdf. See also SERGIO DI AMATO, LA RESPONSABILITÀ DISCIPLINARE DEI MAGISTRATI: GLI ILLECITI, LE SANZIONI (2013).

[100] Nicolò Zanon, *'Sei gradi di separazione': ovvero come assicurare la terzietà della sezione disciplinare del Consiglio superiore della magistratura*, RIVISTA AIC 1 (2012).

[101] These general considerations may be further strengthened by the existence of powers able to enrich the quality of debate and provide more elaborate information on the state of justice, such as Article 10 opinions. Since 1970, the CSM also publishes reports on the state of justice.

[102] See for example http://www.cortedicassazione.it/corte-di-cassazione/it/inaugurazioni_anno_giudiziario.page.

appointments that, as mentioned *supra*, follow informal secret agreements among 'correnti'.[103] Criticism sparked initiatives to make calls and appointment procedures more transparent, especially those of court presidents.[104] In the name of transparency, the CSM new internal rules of procedures approved in 2016 allowed for the publicity of meetings in which court presidents are selected; indeed, normally CSM committee meetings – differently from plenary sessions of the CSM that are also regularly recorded and transmitted on the website of Radio radicale – are otherwise not public. The same rules of procedure also forbid appointments *en bloc* of magistrates belonging to the same court. They also generally provide that CSM activities must abide by the principles of clarity and simplicity.

The CSM's recent commitment to greater transparency, rationality, and simplification is commendable.[105] Other good examples are worth mentioning, such as the disclosure regime introduced for authorizations to extra-judicial appointments of judges and prosecutors.[106] Very recently, a new and more functional website has been designed to enhance the quality and quantity of activities.[107] However, the picture is made of lights and shades. For example, compared to French CSM, information for judges and legal professionals as well as for citizens that would facilitate the understanding of the CSM's accessibility to information on disciplinary procedures is still not satisfactory. In conceptual terms, major concerns regard the findability (accessibility) of the data, rather than their availability. For example, information on disciplinary proceedings is provided in CSM reports; however, no complete and constantly up to date information is collected on the website. This relates more broadly to the insufficiency of statistics and relevant documents on the CSM website – striking if compared with the French CSM and the difference in available resources between the two bodies.

Notwithstanding the important steps towards greater openness, they are hardly due to virtues of the JSG regime, rather than to external pressures. First, the transparency mantra is more general and goes with the problems of courts' informatization and efficiency – concerns put forth by Governments and Ministers of Justice in the last years, and by the European Commission as well. The Parliament itself justified on this basis in 2006 the opening of judicial boards to lawyers in the area of court organization and management.

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[103] In a recent book, a former member of the Council (a judge) reported the existence of a confidential record of the secretariat accessible only to councillors, which includes clear evidence of such informal agreements.

[104] In 2011, a CSM decision also ensured greater publicity of appointment procedures. Yet, information is only accessible to judges and prosecutors through an intranet, decision of 1st June 2011.

[105] Grasso, *supra* note 82.

[106] Grasso, *supra* note 82

[107] While it should include statistics shared with the Ministry of Justice and disciplinary jurisprudence, these contents still wait to be updated, and no English version of the website is foreseen.

Second, enhanced transparency of the appointment process and especially of court presidents is possibly the consequence of the encroachment of the administrative judge on the CSM's decisions. These can be indeed appealed to the Rome Administrative Court (*TAR Lazio*) and then to the Council of State. The practice is relevant since it defines a balance between the discretional powers of the CSM as a constitutional body and the constitutional provisions providing legal redress for acts of the public administration.[108] Whatever the right balance might be, appeal is only possible on legality grounds, with the exclusion of the merits of the CSM decision itself. Nonetheless, the administrative judge traditionally went beyond legality grounds and took into consideration substantive criteria in its decisions. The review performed by the administrative judge is considered too intrusive. Thus, in the last eight years, around 30% of the CSM's decisions on appointments of the most important positions as president and vice-president have been challenged, and 4% of these decisions have been reversed by the Rome Administrative Court.[109]

D. Merits and Limits of an Italian Export Model

This paper mapped the Italian model of JSG and discussed its impact on the independence and accountability of the judiciary. The Italian model contributed decisively to securing the independence of the judiciary in a post-authoritarian country, in which – especially during the twenty-year-long fascist dictatorship but also, to a lesser extent, in the preceding liberal period – the judiciary had been strongly dependent on the MJ. However, this independence was not achieved immediately but has been the result of a long path in which other institutional actors have also played an important part. Furthermore, the success of the Italian model of JSG varies according to values that are taken into consideration. While the independence from the executive power can be rightly considered an established achievement, the internal independence of the judiciary should rather be considered as still in the making. Similarly, while securing the independence of the judiciary, the Italian model of JSG has been far less effective in making the judiciary accountable, which in turn may have affected professionalism and diminished public confidence.

As far as external independence is concerned, it must be recalled that it was not until 1963 – i.e. 15 years after the entry into force of the new Constitution – that the appointment of judges was definitively freed from the influence of the MJ. Interestingly enough, this was

[108] Article 24(1) of the Italian Constitution: "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law"; Article 113(1) of the Italian Constitution: "The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration." As mentioned in Section B., however, the Italian legal scholarship does not agree on considering the CSM, which is a constitutional body, as part of the public administration.

[109] CSM, *Ufficio statistico – Conferimento delle funzioni direttive e semidirettive (V Commissione)*, September 2017, 11–15, https://www.csm.it/documents/21768/137951/Conferimenti+set+2017/bdb9ac90-4c97-f683-2d8d-029eed28b185.

due to a judgment of the Constitutional Court. On the one hand, this proves the effectiveness of constitutional provisions on JSG, when they are backed by a constitutional court that is willing to take judicial independence seriously. On the other hand, this testifies that a situation of de facto (and also de jure) lack of full independence can persist for a significantly long time despite clear constitutional provisions protecting judicial independence.

The path to internal independence has been even longer, and it is still not concluded. As the figures have shown, it was only in 1981 that the artificial predominance of the judges from the Supreme Court in the CSM was redressed. Yet, the overcoming of the undue influence of the senior judges has not been followed by judicial internal independence, but rather by the influence of the 'correnti'. So far, no legislative reform has been able to properly curb this influence. However, other threats to judicial internal independence could have been properly resisted. The constitutional choice to centralize all substantive powers concerning both the careers and the disciplinary responsibility of the judges in the hands of the CSM has proven to be particularly effective. This prevented other actors, notably the courts' presidents, from exercising undue pressure over the judges, as it has happened in other jurisdictions that have adopted a similar Council of the Judiciary.[110]

The overall picture is far less bright as far as judicial accountability is concerned. A progression system based essentially on seniority rather than merit and a too restrained exercise of disciplinary responsibility have failed to establish a system of rewards and sanctions to make judges accountable for their behavior. To a certain extent, weak accountability seems to be the other side of the coin of a rather strong judicial independence. However, it would not be correct to claim that the Italian model of JSG is structurally unbalanced to the benefit of independence and to the detriment of accountability. The reasons for such unbalance are cultural rather than institutional. After all, as the Constitutional Court stressed in judgment 168/1963, 'the independence of the judiciary has its first and fundamental guarantee in the sense of duty of magistrates and in their obedience to the moral law, which pertains to their high office and which consists in giving justice impartially'.[111] The same applies to accountability. What makes accountability difficult is not the legal framework of the Italian JSG but the corporative culture within the judiciary, which no legislative reform has been able to overcome so far. In this regard, two crucial issues stand. The first and most important, which remains outside the limited scope of this article, is the recruitment and selection procedures of new magistrates. The second concerns the initial and continuous training of judges, where the establishment of an

[110] Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance,* in this issue.

[111] *Supra* note 26, translation by the authors.

autonomous judicial school seizing the powers of the CSM is supposed to open up the judiciary, even though the practical implementation still awaits proper assessment.[112]

[112] It has been observed that the transfer of powers in the field of training from the CSM to the autonomous High School for the Judiciary involved two effects: the weakening of practical, in-court training on one hand, and the "technicization" of knowledge coupled with the detachment of trainees, especially the new ones, from the main self-governing authority, on the other.

Articles

Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey

By Başak Çalı & Betül Durmuş[*]

Abstract

This article traces the evolution of judicial self-government practices (JSG) in Turkey and argues that the frequent changes in JSG are part of a broader trajectory of experimental constitutional politics. The Council for Judges and Prosecutors has experienced sharp turns since its establishment in 1961, respectively in 1971, 1982, 2010, 2014 and 2017. During this period, Turkey experienced different forms of judicial councils ranging from co-option, hierarchical and executive controlled judicial council models to a more pluralistic model. The Justice Academy of Turkey has also not been immune from this experimentalism. The article discusses the endogenous relationship between these often short-lived experiments of JSG and their impacts on the independence, accountability, and legitimacy of the judiciary and public confidence in the judiciary. The article then turns to the repercussions of JSG on separation of powers and democratic principle. It focuses on the implications of the ambiguous position of the Council in the state structure for the separation of powers, and the revived debate on democratic legitimacy of JSG after the 2017 constitutional amendments.

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A. Introduction

This article traces the genesis and the subsequent development of judicial self-government (JSG) in the Turkish legal and political context. It does so by highlighting the critical junctures of JSG practices across time, starting from the 1960 Constitution and ending with the latest constitutional amendments in 2017. The paper shows that the evolution of JSG in Turkey is part of a larger trajectory of constitutional politics, marked by contestation with regard to the appropriate role of the judiciary in the Turkish political context. Moves to strengthen and weaken JSG and, in turn, how these impact on judicial independence, accountability, legitimacy, public confidence in the judiciary and separation of powers can only be understood in the broader context of Turkey's constitutional trajectory, which has taken multiple sharp turns since 1960.

Since the establishment of the Republic, Turkey has experimented with diverse forms of JSG ranging from no JSG, a co-option judicial council model, a hierarchical judicial council model, the executive controlled judicial council model and a pluralist judicial council model, under different political conditions. It must, however, be borne in mind that all these models have a 'Turkish' flavor to them and incorporate a number of novelties. Each time a new model has been introduced, it has had its ardent supporters, but it has also been subject to heated debates, in particular, with a specific emphasis on the implications of these different models for judicial independence and the separation of powers. JSG reforms invariably took place against a larger background of transformative constitutional moments and not as reforms that were brought forward following long and wide-ranging consultations, and reflection. Significantly, only in the space of the last seven years, JSG has evolved from strong, independent, and non-hierarchical JSG to strong executive control in a strictly hierarchical model. The reforms, old and new, have attracted deep skepticism regardless of the various merits of the reforms on paper.

In recent times, JSG reforms have taken place against the background of the rise of, what some have framed as the gradual entrenchment of a competitive authoritarian form of governance, under the rule of the Justice and Development Party (AKP) in Turkey since 2002 and the prevalence of factional judicial politics that ensued in the same period.[1] Since the state of emergency was declared following the failed coup attempt of July 2016, one quarter of the judiciary has been purged on the grounds that they had links to, or contact with, or were members of the Fetullahist Terrorist Organization ("FETO/PDY") that allegedly carried out the failed coup attempt.[2] The very recent changes in JSG, thus, are

[1] Ergun Özbudun, *Turkey's Judiciary and the Drift Toward Competitive Authoritarianism*, 50 THE INTERNATIONAL SPECTATOR 42(2015); Berk Esen & Sebnem Gumuscu, *Rising competitive authoritarianism in Turkey*, 37 THIRD WORLD QUARTERLY 1581(2016).

direct responses to the dominance of the judiciary by what is now understood as a factional group with significant number of supporters in the judiciary.

In what follows, in part B, we discuss the trajectory of JSG against the background of larger constitutional and political developments in Turkey. In Part C, we highlight the endogenous nature of the changes in JSG and its impacts on independence, accountability, and legitimacy of the judiciary and public confidence in the judiciary. The frequent and fundamental changes to JSG in Turkey, however, renders it difficult, if not impossible, to trace the impact of each distinct JSG model on the independence, accountability, transparency, and legitimacy of the judiciary. The frequent experimentation with different models of JSG in Turkey points to the unconsolidated place of the judiciary in the Turkish constitutional and political landscape. In part D, we reflect on how the changes in JSG can be seen in terms of the separation of powers and democratic principle doctrines in the Turkish context, in particular amongst Turkish legal scholars. We show that the nature of JSG in Turkey remains deeply political and politicized despite the institutionalization of JSG under the Constitution since 1961.

B. Forms and Rationales of Judicial Self-Government

Turkish judicial system is a typical example of a continental system which is based on separation of civil and administrative jurisdictions. While the former includes civil and criminal first instance courts, regional civil courts and the Court of Cassation; the latter covers first instance administrative and tax courts, regional administrative courts and the Council of State.

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[2] The Economist, *Turkey's purges are crippling its justice system* (May 20, 2017) https://www.economist.com/news/europe/21722200-president-erdogans-drive-power-includes-putting-judges-under-his-thumb-turkeys-purges-are; the Gülen movement emerged in the 1970s under the leadership of Fetullah Gülen, had once seen as a liberal Islamist movement supporting the idea of inter-religious dialogue and modernism, and had been distinguished from other fundamental Islamist groups. *See* Niyazi Öktem, *Religion in Turkey*, 2002 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 371 (2002).; Bülent Aras and Ömer Çapa, *Fethullah Gülen and His Liberal 'Turkish Islam' Movement*, *in* REVOLUTIONARIES AND REFORMERS: CONTEMPORARY ISLAMIST MOVEMENTS IN THE MIDDLE EAST (Rubin Barry ed., 2003).; İştar B. Gözaydın, *The Fethullah Gülen movement and politics in Turkey: a chance for democratization or a Trojan horse?*, 16 DEMOCRATIZATION 1214 (2009). Beginning from the 1990s, the movement gained supporters and sympathisers in the social, political, and economic life in Turkey and abroad. Educational institutions set up by the movement in Turkey and abroad were central to its popularity. The linkage between the movement and the Justice and Development Party (AKP) became apparent when the supporters of the movement were able to hold important positions in the bureaucracy, judiciary, and security forces under the long rule of the AKP from 2002. This partnership ended in December 2013. When the alliance was broken, the AKP first argued that the movement had formed a "parallel state", and later the movement was recognized as a terrorist organization. *See* the history of the movement and its relations with the AKP government in Filiz Başkan-Canyaş & F. Orkunt Canyaş, *The interplay between formal and informal institutions in Turkey: the case of the Fethullah Gülen community*, 52 MIDDLE EASTERN STUDIES 280 (2015); Hakkı Taş, *A history of Turkey's AKP-Gülen conflict*, MEDITERRANEAN POLITICS (2017).

The powers regarding court administration and the career of judges are shared among the Council for Judges and Prosecutors ("HSYK"), the Justice Academy, and supplementary JSG bodies including the Justice Commissions and the supreme courts. These bodies are clear examples of JSG since they are mostly composed of judges. The Ministry of Justice, on the other hand, previously held and continues to hold important powers on court administration and judicial government, but this does not qualify as a form of judicial *self*-government.[3] The Ministry can be regarded as an affiliated body holding a key role in the shaping of JSG, particularly through its dominant positions in the Council and the Academy.

I. The Council for Judges and Prosecutors

The Council for Judges (which was later merged with the Council for Prosecutors) was established as a constitutional body in the 1961 Constitution that was enacted in the aftermath of the 1960 military coup. Since then, it has preserved its constitutional status. Although it has been more than forty years since its establishment, its composition, qualifications, the election procedures of its members, and its powers have been subject to changes in critical political junctures. As the Venice Commission noted in 2010, Turkey has a tradition of politicizing the administration of the Council.[4] This can be seen in the changes that have been introduced to the composition and the powers of the Council respectively in 1971, 1982, 2010, 2014, and 2017. Of these changes only the ones in 2014 were brought forward by way of legislation, the rest were constitutional amendments. How the judiciary governs itself has, therefore, been rearranged at each constitutional juncture (with the exception of 2014 amendments).

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[3] There are judges who serve administrative tasks at the Ministry of Justice. The Minister of Justice is entitled to appoint judges, with their consent, to carry out temporary or permanent tasks in "the central, affiliated, or relevant institutions of the Ministry of Justice. According to Article 159/12 Constitution, "Those judges and public prosecutors working in administrative posts of judicial services shall be subject to the same provisions as other judges and public prosecutors. Their categories and grades shall be determined according to the principles applying to judges and public prosecutors, and they shall enjoy all the rights accorded to judges and public prosecutors.' Although judges working in administrative posts enjoy the same rights as other judges with judicial functions, this does not suffice to regard the Ministry of Justice as a JSG body since Article 140/7 of the Constitution also stipulates that they are "attached to the Ministry of Justice" with regard to their administrative duties. In addition to their attachment to the Ministry, it is also difficult to trace the impact of their role. As of March 2017, 394 judges work at the central institution of the Ministry at different posts. *See* http://www.hsk.gov.tr/Eklentiler/Dosyalar/962736e7-d42b-4930-bd91-ec352fea7891.pdf.

[4] *Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors of Turkey,* European Commission for Democracy through Law (Venice Commission), CDL-AD(2010)042, (Dec. 20, 2010), par. 18.

1. The 1924 Constitution: Absence of JSG

A proper explanation for the rationale of the establishment of the Council in 1961 requires looking at the role of the judiciary in the aftermath of the enactment of the 1924 Constitution of the Turkish Republic. The 1924 Constitution provided for the judicial function to be carried out by "independent courts"[5] and recognized the independence of judges from intervention by other branches of the state.[6] It did not, however, secure the tenure of judges in the Constitution. In effect, the Constitution allowed for the dismissal of judges by ordinary laws by stating that "judges cannot be dismissed except by circumstances prescribed by law."[7] Other professional rights of the judges including the organization of their duties and salaries were also delegated to ordinary legislation.[8]

The Law on Judges of 1934[9] established the Council of Separation ("*Ayırma Meclisi*") and endowed it with powers to advise the Minister of Justice on the promotion of judges. This Council was chaired by the President of the Court of Cassation. The Chief Public Prosecutor, four members of the Court of Cassation, and four Directors of the Ministry of Justice became the other members of the Council of Separation. This, however, was not a judicial council in today's sense, because its powers were quite limited, and the Ministry of Justice retained the sole authority deciding on the appointment and promotion of judges.

Due to these features, many commentators characterize the protections afforded to judicial independence in the 1924 Constitution as weak.[10] During the Republican People's Party (CHP) single party rule between 1923 and 1950, however, this lack of constitutional protection for the judiciary did not result in serious tensions between the executive and the judiciary. This is attributed to the absence of a distinction between the objectives of the single party rule and the judiciary, where the latter mirrored the former.[11] The

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[5] Article 8 of the 1924 Constitution; The English version of the full text can be found in Edward Mead Earle, *The New Constitution of Turkey*, 40 POLITICAL SCIENCE QUARTERLY (1925) http://genckaya.bilkent.edu.tr/1924constitution.pdf.

[6] Article 54 of the 1924 Constitution.

[7] Article 55 of the 1924 Constitution.

[8] Article 56 of the 1924 Constitution.

[9] Law no. 2556, enacted on 4/7/1934.

[10] ERGUN ÖZBUDUN, 1924 ANAYASASI 57 (2012); Kemal Gözler, *1924 Teşkılatı Esasiye Kanunu* http://www.anayasa.gen.tr/tek-1924.htm.

[11] Ceren Belge, *Friends of the Court: Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 L. AND SOC'Y REV.653 (2006).

weakness of the constitutional framework regarding the judiciary was seen in a more negative light when the multi-party regime was adopted in 1950, and a new party, the Democrat Party (DP) came into power through elections. Subsequently, the absence of security of tenure for judges led to important political crises when the newly elected DP government used ordinary laws to purge senior judges, which it saw as supporters of the old regime, that of the CHP. In 1953, legislation passed made it possible to send any civil servant who served more than 30 years into early retirement.[12] Many judges serving in the ordinary courts were forced to retire due to this.[13] In 1954, the time limit for retirement was lowered to 25 years allowing the purge to also cover members of the Court of Cassation.[14]

2. The 1961 Constitution: The Establishment of the Judicial Council

The DP rule ended with the military coup of 1960. The 1961 Constitution, well known for its concern for imposing checks on elected governments under the multi-party regime[15], introduced significant protections for the independence of the judiciary from political meddling. Unlike the 1924 Constitution, the 1961 Constitution was based explicitly on the principle of separation of powers, and established for the first time "counter-majoritarian institutions"[16] including the Constitutional Court, the High Council of Judges (the Council), the National Security Council, and the State Planning Organization. Many scholars refer to Ran Hirschl's "hegemonic preservation thesis"[17] to explain, in particular, the establishment of the Constitutional Court, and the constitutional protections afforded to the judiciary under the 1961 Constitution.[18] This thesis also seems relevant for the establishment of the Council. The rationale for establishing the Council was to insulate decisions on the career

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[12] ERIC ZÜRCHER, TURKEY: A MODERN HISTORY 241 (2004).

[13] ŞEREF ÜNAL, ANAYASA HUKUKU AÇISINDAN MAHKEMELERIN BAĞIMSIZLIĞI VE HÂKIMLIK TEMINATI: TÜRK YARGI SISTEMI ÜZERINDE KARŞILAŞTIRMALI HUKUK AÇISINDAN BIR İNCELEME 72 (1994).

[14] *Id.*

[15] Ceren Belge, *supra* note 11, at 663.

[16] *Id.*

[17] Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalism: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91 (2000).

[18] Güneş Murat Tezcür, *Judicial Activism in Perilous Times: the Turkish Case*, 43 LAW & SOC'Y REV. 305, 309 (2009); Ceren Belge, *supra* note 11, at 664; Ergun Özbudun, *Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy*, 12 EUR. PUB. L. 213 (2006); Hootan Shambayati and Esen Kirdiş, *In Pursuit of Contemporary Civilization: Judicial Empowerment in Turkey*, 62 POLITICAL RESEARCH QUARTERLY 767, 769 (2009).

of judges from the control or influence of the elected governments, as was witnessed by the DP purges of judges.

The Constitution assigned broad self-governance powers to the Council by stating that the Council had "the power to decide about all personal matters of the judges."[19] The Council was composed of eighteen regular and five substitute members. Six regular and two substitute members were elected by the General Assembly of the Court of Cassation; six regular members and one substitute member were elected by the first category judges among themselves; six regular and two substitute members were elected by the National Assembly and the Senate. The candidates for membership were selected from individuals who served as judges in the high courts or were qualified to serve in such courts.[20] The Council could elect its Chair from among its members.[21] The Minister of Justice might attend the meetings of the Council, but could not vote.[22] Limiting the involvement of the Minister in such a way had been a great sign of the Council's autonomy, and a strong preference for judicial self-government in general.

This composition shows that the 1961 Constitution adopted the co-option model. All the members of the Council were elected amongst judges. However, the role of the parliament in the election procedure prevented the Council being characterized as a strict case of co-option. Additionally, a balance had been sought between the high judiciary and the first category judges to prevent the Council having a hierarchical model.

3. The 1971 Constitutional Amendments: Introducing the Ministry in the Council

The 1961 Constitution and the return to civilian rule was not long lived. Not only was the Constitution amended seven times between 1969 and 1974, the government was forced to resign by a military intervention in 1971, claiming social unrest and economic failure under their rule. The post 1971 amendments to the Constitution, blamed the autonomous and decentralized outlook of the 1961 Constitution for governance failures and aimed to strengthen the powers of a centralized executive. This outlook also brought important changes to the composition of the Council and its relationship with the Minister of Justice. First, the total number of members was decreased to eleven regular and three substitute members. Secondly, all Council members were to be elected by the General Assembly of the Court of Cassation from among its own members. Thirdly, the amended Constitution

[19] Article 144/1 of the 1961 Constitution.

[20] Article 143/1 of the 1961 Constitution.

[21] Article 143/2 of the 1961 Constitution.

[22] Article 143/6 of the 1961 Constitution.

set out that the Minister of Justice could attend the meetings of the Council "in case he deems it necessary." The 1971 amendments further gave the Minister of Justice the power to chair meetings and the right to vote. Thus, with the 1971 amendments, the Council turned into a hierarchical model, and its earlier autonomy was weakened.

4. The 1982 Constitution: A Dependent and Hierarchical Judicial Council

The civilian rule was interrupted a third time by the 1980 military coup. The 1982 Constitution that followed reorganized the judicial council carving out an even stronger role for the executive in all matters with respect to the administration of the judiciary. First, and most importantly, the Minister of Justice became the Chair, and the Undersecretary of the Ministry of Justice became an ex officio member of the Council.[23] Secondly, the President of the Republic was given powers to appoint members. Thirdly, the total number of members decreased to seven regular and two substitute members. Accordingly, the President of the Republic was given the power to appoint three regular and three substitute members from the candidates proposed by the General Assembly of the Court of Cassation, and two regular and two substitute members from the candidates proposed by the General Assembly of the Council of State.[24] Another crucial change that occurred around this time was that the previously separate Councils for judges and prosecutors were joined in one institution and the Council thus became the High Council of Judges and Prosecutors.

The autonomy of the Council, already weakened by the 1971 amendments, was almost entirely abolished by the 1982 Constitution. This was in line with the broader rationale of the 1982 Constitution, which was to further strengthen the executive. The Council was no longer responsible for "all personal matters." Rather, the powers of the Council were explicitly listed as "the admission of judges and public prosecutors of civil and administrative courts into the profession, appointment, transfer to other posts, the delegation of temporary powers, promotion, and promotion to the first category, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office."[25] Although the Council had the authority to impose disciplinary sanctions, supervision or investigation of the judges was left outside the powers of the Council, and was given to the Board of Inspectors that sit in the Ministry of Justice.[26]

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[23] Article 159/2 of the 1982 Constitution (the first version).

[24] *Id.*

[25] Article 159/3 of the 1982 Constitution (the first version).

[26] Article 15 of the Law on the Ministry of Justice (Law no. 2992, 29/3/1984).

5. The 2010 Constitutional Amendments: Non-hierarchical and Pluralistic Council

The social legitimacy of the 1982 Constitution has long been suspect. Not only was the constitution the product of a violent military coup that perpetrated gross human rights violations, but its vision reflected an anti-democratic world view. There have, therefore, long been calls to have a "civil constitution" underpinned by unequivocal commitments to democracy, human rights and the rule of law. Between 1982 and 2010, the Constitution was amended ten times. Although diverse in terms of focus, they include amendments that substantively increased the fundamental rights protections under the Constitution. None of these amendments, however, touched the powers of the Council until 2010. The Justice and Development Party, which came into power in 2002, turned to the design of the Council in its constitutional amendment package of 2010. The government presented the 2010 package as a continuation of the increased emphasis on human rights and democracy in the Constitution. The package included important provisions on protection of fundamental rights and freedoms, curbing the power of military courts, and lifting the immunity of the military officers responsible for the 1980 coup.

The 2010 amendments, regarding the composition of the Council, increased the number of its members and identified multiple ways of election to the Council. The total number of members increased to twenty-two regular and twelve substitute members. Along with the two supreme courts, and the President of the Republic, the first category judges and prosecutors as well as the General Assembly of the Justice Academy became eligible to elect members to the Council. As the Constitution sets out,

> For a term of four years, four regular members of the Council, the qualities of whom are defined by law, shall be appointed by *the President of the Republic* from among members of the teaching staff in the field of law, and lawyers; three regular and three substitute members shall be appointed by *the General Assembly of the High Court of Appeals* from among members of the High Court of Appeals; two regular and two substitute members shall be appointed by *the General Assembly of the Council of State* from among members of the Council of State; one regular and one substitute member shall be appointed by *the General Assembly of the Justice Academy of Turkey* from among its members; seven regular and four substitute members shall be elected by *civil judges and public prosecutors* from among those who are first category judges and who have not lost the qualifications required for being a first category judge; three regular and two substitute members shall be elected by *administrative judges and public prosecutors* from among

> those who are first category judges and who have not lost the qualifications required for being a first category judge.[27]

The 2010 changes altered the hierarchical model of the Council by opening places in the Council for the first category civil and administrative judges and prosecutors, members of law schools and lawyers as well as members of the Justice Academy. Significantly, for the first time in the history of the Council, the first category judges and prosecutors made up the majority of the Council, out-numbering members of the high judiciary. The role of the Ministry of Justice as the Chair, and the Undersecretary of the Ministry as an ex officio member of the Council, however, remained the same.

The 2010 amendments also increased the powers of the Council by transferring the power of disciplinary supervision and investigation of judges to the Board of Inspectors of the Council from those sitting at the Ministry of Justice.[28] The institutional structure of the Council changed as the Council began to work in three chambers.[29] The amendments also prevented the Minister of Justice from participating in the work of the chambers of the Council.[30] A General Secretariat was established for the Council. The Secretary General was appointed by the President of the Council, i.e. the Minister of Justice, among three candidates proposed by the Council from among the first category judges and prosecutors.[31] Right after the entry into force of these amendments, the Law on the High Council of Judges and Prosecutors was adopted. This law ensured that the Council could run its own budget and have its own staff and premises.[32]

The 2010 amendments attracted significant public attention and divided the Turkish legal community as to their underlying political purpose.[33] Some welcomed the amendments

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[27] Emphasis added. *See* Article 159/3 of the 1982 Constitution as amended on September 12, 2010.

[28] Article 159/9 of the 1982 Constitution as amended on September 12, 2010.

[29] Article 159/2 of the 1982 Constitution as amended on September 12, 2010. The competences of each chamber have been regulated in article 9 of the Law on the High Council of Judges and Prosecutors (Law no. 6087, 11/12/2010).

[30] Article 159/7 of the 1982 Constitution as amended on September 12, 2010.

[31] Article 159/11 of the 1982 Constitution as amended on September 12, 2010.

[32] Article 5 of the Law on High Council of Judges and Prosecutors presents the organization of the HSYK and Article 44 of the same law states that "The Council is governed with its own general budget."

[33] For a review of the whole constitutional amendment package *see* Esin Örücü, *The Turkish Constitution Revamped Yet Again*, 17 EUR. PUB. L. 11(2011).

pointing to their overall "liberalizing" and "democratizing" effect.[34] Others argued that the amendments would result in "the centralization of power in the hands of one party",[35] and were a part of a "court-packing plan."[36] For the latter group, the 2010 amendments represented the Justice and Development Party's attempt to reengineer the judiciary in order to bring it in line with its political outlook, not unlike the developments under the DP rule in the 1950s. The emphasis on democratizing the Council was seen as a screen to conceal and make palatable the larger political plan aimed at changing the guardians of the judiciary.

6. The December 2013 Corruption Crisis and the 2014 Legal Changes

In an unexpected turn of events, the 2010 amendments introducing a non-hierarchical form of JSG did not last long. The so-called corruption crisis of December 2013 not only revealed the political deals behind the 2010 amendments, but also laid bare that the judiciary was not going to be immune from the fallout between President Erdoğan and cleric Fetullah Gulen and his movement, a longtime supporter of Erdogan and his government.

The crisis started with the detention of the sons of three acting Ministers, some businessmen and a Mayor on 17 December 2013 for crimes of corruption. This was followed by further investigations on 25 December 2013 and included charges against well-known businessmen and, the then Prime Minister, Recep Tayyip Erdoğan's son. The government responded to this by saying that these investigations and subsequent charges were pursued by 'a parallel structure' that had infiltrated the police, and the security forces led by the cleric Fetullah Gulen.

In order to prevent possible operations conducted by the police that may be part of this 'parallel structure', the government changed the "Regulation on the Judicial Police" on 21 December 2013. According to the new regulation, police officers involved in criminal investigations conducted by public prosecutors, were obliged to inform administrative authorities about the investigation. This development was criticized by the Council with a press release suggesting that the new version of the regulation weakened the

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[34] Aslı Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VIRGINIA J. INTL. L. 235 (2012); Aslı Bâli, *Unpacking Turkey's 'Court-Packing' Referendum*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT (Nov. 5, 2010) http://www.merip.org/mero/mero110510.

[35] Ceren Coşkun, *Don't sweeten the bitter pill of an illiberal democracy*, OPENDEMOCRACY (Sep. 10, 2010) https://www.opendemocracy.net/ceren-coskun/don%E2%80%99t-sweeten-bitter-pill-of-illiberal-democracy .

[36] Can Yeginsu, *Turkey Packs the Court,* THE NEW YORK REVIEW OF BOOKS (Sep. 22, 2010) http://www.nybooks.com /contributors/can-yeginsu/.

independence of the judiciary.[37] Taking this as a signal that the newly composed non-hierarchical Council may also be part of the 'parallel structure', the government turned its attention to amending the current law on the Council with the aim of increasing the powers of the Ministry of Justice within it.[38] Due to the cumbersome process of constitutional amendment and the perceived urgency of the matter, the government introduced a number of amendments through ordinary law.

After several attempts, Law no. 6524 entered into force in 2014, amending some provisions of the relevant laws on the judiciary including the Law on Judges and Prosecutors, the Law on the High Council of Judges and Prosecutors, and the Law on the Justice Academy of Turkey. Two amendments brought by this new law were particularly important with regard to JSG. First, the new law gave power to the Minister of Justice to appoint the members of the chambers of the Judicial Council.[39] Secondly, a provisional article in the new law terminated the existing positions, in the Council, of the Secretary General, assistant secretaries general, the Chairman of the Board of Inspectors and the Vice-Chairmen, Council inspectors, reporting judges, and the administrative personnel in the Council at that time and gave the power to the Minister of Justice to appoint new people to these positions.[40] With the entry into force of the new law, these two amendments were implemented promptly. Although the Constitutional Court annulled these provisions on the basis of unconstitutionality, this judgement did not affect the administrative decisions of the Minister on the new appointments.[41]

These amendments pointed to the concerns of the government that a significant number of judicial positions were occupied by individuals who were loyal to, supporting or sympathizing with the Gulen movement. They also confirmed the fears of those critical of the 2010 amendments that the government's proposal of redesigning JSG was motivated by the intention of bringing judges to power who were loyal to the government. Once the

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[37] At that time Prime Minister Erdoğan strongly opposed this action of the HSYK. *See* Hurriyet Daily News, *I would judge the Supreme Council of Judges and Prosecutors if I had the authority* (Dec. 27, 2013) http://www.hurriyetdailynews.com/i-would-judge-the-supreme-council-of-judges-and-prosecutors-if-i-had-authority-turkish-pm.aspx?pageID=238&nID=60233&NewsCatID=338.

[38] *See* the effects of the corruption crisis on the Council in Ergun Özbudun, *Pending Challenges in Turkey's Judiciary*, GLOBAL TURKEY IN EUROPE (2015).

[39] Article 25 of the Law no 6524, enacted on February 15, 2014.

[40] Article 39 of the Law no 6524.

[41] Constitutional Court, E. 2014/57, K. 2014/81 (14 April 2014). According to article 153 of the Constitution, the judgments of the Constitutional Court are not retroactive. This means, the Court cannot abrogate the decisions taken before the date of the judgment.

loyalty of Gulenist judges became suspect, the 2010 amendments no longer served their purpose.

7. The 2017 Constitutional Amendments: Increased Control of the President of the Republic in Judicial Governance

The 1982 Constitution created the office of the Presidency of Turkey as the neutral and non-partisan guardian of the state elected by the Parliament. However, the role and powers of the President have been contested, particularly, by the right-wing conservative political circles demanding for a popularly elected President. Eventually in 2007, the election procedure of the President was amended. The 2007 constitutional amendments - adopted through a referendum - enabled the President to be elected directly by public vote.[42] However, the neutral standing of the President towards the political parties remained until the 2017 constitutional amendments.

The 2017 constitutional amendments concern transformation of the Turkish constitutional system into a form of partisan presidentialism, and have been discussed in the broader context of the repercussions of this for the separation of powers, and checks and balances.[43] Reform of the Council was an important part of the 2017 constitutional amendments, and it cannot be separated from this broader constitutional arrangement.

According to the amendments entered into force on 16 April 2017,[44] the Council shrunk significantly and is now composed of thirteen members instead of twenty-two members. The President of the Turkish Republic (who after the 2017 constitutional amendments can also be the active head of a political party whilst acting as President) appoints three members from among first category civil judges and prosecutors, and one member from among administrative judges and prosecutors. The Grand National Assembly elects three members from the Court of Cassation, one member from the Council of State, and three

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[42] Law no 5678, enacted on October 21, 2007 amending article 101 of the 1982 Constitution.

[43] Bertil Emrah Oder, *Turkey's ultimate shift to a presidential system,* CONSTITUTIONNET (Jan. 31, 2017) http://www.constitutionnet.org/news/turkeys-ultimate-shift-presidential-system-most-recent-constitutional-amendments-details ; Felix Petersen & Zeynep Yanaşmayan, *The Final Trick? Separation of Powers, Checks and Balances, and the Recomposition of the Turkish State,* VERFASSUNGSBLOG (Jan. 28, 2017) http://verfassungsblog.de/the-final-trick-separation-of-powers-checks-and-balances-and-the-recomposition-of-the-turkish-state/; Ozan Varol, *Presidentialism in Turkey: Is It Already Here?*, CONSTITUTIONNET (Nov. 24, 2015) http://www.constitutionnet.org/news/presidentialism-turkey-it-already-here

[44] The majority of the amendments will enter into force either after the start of the proceedings for the next general and presidential elections, or when the next National Assembly and President of the Republic begin to work. The amendments concerning the Council for Judges and Prosecutors entered into force right after the results of the referendum had been published at the official gazette. *See* Article 18 of the Law No. 6771.

members who are lawyers and law professors. The Minister of Justice continues to be the Chair of the Council, and the Undersecretary of the Ministry of Justice remains an ex-officio member.

The shift between the 2010 and 2017 amendments are remarkable in the sense that whilst the former enabled the election of the Council by the judiciary, the latter ended this and vested the power to appoint and elect judicial members to the President of the Republic and the National Assembly. It further gave these two organs power to elect members outside the judiciary, as lawyers and law professors continue to be eligible for the Council membership.

In sum, the experimental journey of the election and the composition of the Council reflects the contested nature of the role of the judiciary in the Turkish constitutional landscape. Although the Council had been established as a strong guardian of judicial independence and vested with wide powers on the careers of judges in 1961, it did not remain as such due to many interventions, particularly to its composition (see table on the following page).

The Composition of the Judicial Council

	Hierarchy (Senior Judges: Junior Judges)	**Co-option or Mixed (Judicial: Executive: Others)**	**The Actor(s) Appointing/Electing the Members**	**The Role of the Ministry of Justice**
1924	Absence of JSG			
1961	Hierarchical (12:6)	Co-option (18: None)	Grand National Assembly (6) + Peer elections among judges (12)	None
1971	Hierarchical (11: None)	Co-option (11: None)	High Judiciary (11)	Optional chairmanship for the Minister
1982	Hierarchical (7: None)	Mixed (7: 2)	President of the Republic (7) *among the candidates elected by the high judiciary	Minister of Justice (Chair **with** the right to vote) Undersecretary (ex officio member)
2010	Non-Hierarchical (5:10)	Mixed (15: 2: 5)	President of the Republic (4) + High Judiciary (5) + Peer elections among junior judges (10) + Justice Academy (1)	Minister of Justice (Chair **without** the right to vote) Undersecretary (ex officio member)
2017	Equal Representation (4:4)	Mixed (8: 2: 3)	President of the Republic (4) + Grand National Assembly (7)	

II. The Justice Academy of Turkey

The Justice Academy of Turkey is part of the contemporary judicial reform packages introduced during the rule of the Justice and Development Party. It was founded in 2003 by ordinary law[45] and became operational in 2004. Prior to its establishment, the pre-professional training of judges and prosecutors was conducted by the School for Candidate Judges and Prosecutors which was attached to the Education Department of the Ministry of Justice.[46] It is noteworthy that upon its establishment the Academy, at least on paper, was given "scientific, administrative, and financial autonomy."[47]

Parallel to the developments in the changes to the Council, the de jure autonomy of the Academy was weakened by the 2014 and 2016 legal amendments which increased the influence of the Ministry in its running. The 2014 changes vested the power to appoint the President and deputy-presidents of the Academy in the Minister of Justice.[48] The composition of the General Assembly of the Academy also changed. Until 2014, the Academy had eight members from the Ministry of Justice, including the Minister, and nine members from the supreme courts (Court of Cassation, Council of State, High Military Court of Cassation, and High Military Court of Administration) as well as representatives of lawyers, law professors, and notaries. The 2014 changes increased the number of members from the Ministry from eight to eleven. It also gave power to the Minister to appoint six members from the first category civil and administrative judges and prosecutors to the General Assembly.[49]

The 2016 changes introduced an oral examination after completion of the pre-service training, whereas previously, only a written examination was required.[50] The training program now lasts for two years and is divided into three periods: i) preparatory training, ii) internship, and iii) final training.[51] The candidates are required to collect seventy points in total from the oral and written examinations in order to be appointed as judges or

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[45] Law on the Justice Academy of Turkey (Law no. 4954, 23/7/2003).

[46] Law no. 3221, enacted on June 15, 1985.

[47] Article 4 of Law on the Justice Academy of Turkey.

[48] Article 9 of Law on the Justice Academy of Turkey.

[49] Article 12 of the Law on the Justice Academy of Turkey.

[50] Article 28/7 and 8 of the Law on the Justice Academy of Turkey (the first version).

[51] Article 28 of the Law on the Justice Academy of Turkey.

prosecutors.[52] The ones who fail the exams can request to be appointed to administrative tasks at the Ministry of Justice, otherwise, their candidacy is terminated.[53] According to the changes of 2016 that introduced the oral exam after the pre-service training, the oral exam is conducted by a board chaired by the President of the Academy which includes four members from the Ministry, as well as two regular members and one substitute member from the law professors lecturing in the Academy.[54] It is noteworthy that the judicial members of the General Assembly are not present in the examination board, and the high ranking officers of the Ministry hold the majority.

III. Supplementary JSG Bodies

The justice commissions and the supreme courts - the Court of Cassation and the Council of State - also have JSG duties, supplementing those of the Justice Academy and the Council, regarding supervision of judges.

The justice commissions in the civil jurisdiction are formed in every district where an assize criminal court exists. It is comprised of three judges (the chairperson, one regular member, one substitute member) appointed by the Council, and the public prosecutor of the district.[55] The justice commissions in the administrative jurisdiction, on the other hand, are formed in the districts where the regional administrative courts are established. Two regular members and one substitute member of these commissions are administrative judges appointed by the Council.[56] These commissions can be described as the administrative units supplementing the Ministry of Justice with regard to their duties managing the administrative personnel of courts and courthouses. However, they are also given the power to supervise both candidate and qualified judges, which makes them supplementary JSG bodies.

First, they provide appraisal of the performance and capabilities of the candidate judges at the end of their internship period. This appraisal is included in the files of each candidate.[57]

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[52] Article 28/13 of the Law on the Justice Academy of Turkey.

[53] Article 28/14 of the Law on the Justice Academy of Turkey.

[54] Article 28/10 of the Law on the Justice Academy of Turkey as amended on July 1, 2016.

[55] Article 113/a of the Law on Judges and Prosecutors.

[56] Article 113/b of the Law on Judges and Prosecutors.

[57] Article 11 of the Law on Judges and Prosecutors.

Secondly, they decide on the extra working days and hours of the judges,[58] and on compassionate leave if requested.[59] Thirdly, and most importantly, they inform the Ministry of Justice when they consider that the actions of a judge necessitate a disciplinary investigation.[60]

The Court of Cassation and the Council of State have JSG duties supplementing the performance evaluation system. After the review of the appeals against the decisions of the first instance courts, the chair of the chamber which reviewed the decision evaluates the conduct and performance of the judge and prepares an "appeal evaluation form."[61] This type of evaluation was removed in 2011, but re-introduced in 2016. The judges of the high courts scrutinize the conformity of the lower courts' decisions with the law, the length of the proceedings, and whether procedural rules are respected. The grades (very good, good, fair, bad, very bad) written in these forms are taken into account by the Council in the promotion of judges.

C. Impact of Judicial Self-Government Experiments on the Independence, Accountability, Legitimacy, Transparency, and Confidence in the Judiciary

In the Turkish context, it must first be underlined that the relationship between JSG and independence, accountability, legitimacy, transparency, and confidence (IALTC) in the judiciary is an endogenous relationship. That is, it is not only that the JSG experiments impact on these values, but that perceived or real IALTC also justifies the wide range of JSG experiments in practice. In what follows we seek to explore this two-way relationship.

I. Judicial Self-Government and Judicial Independence

Given the continuous interventions into the management of the judiciary in Turkish political history, it is no wonder that judicial independence has always been a debated issue in the political and public life of the country. For many, the relationship between JSG and judicial independence is an endogenous one. The lack of perceived or real independence of the judges affects how JSG arrangements have changed over time.

Judicial independence discussions in Turkey often center on the general lack of a judicial and institutional culture of independence. Commentators often point to a "state-centered

[58] Article 54 of the Law on Judges and Prosecutors.

[59] Article 56 of the Law on Judges and Prosecutors.

[60] Article 62 of the Law on Judges and Prosecutors.

[61] Article 28 of the Law on judges and Prosecutors.

mindset" within the judiciary that is inclined to protect the interests of the State over individual rights and freedoms.[62] This state centric mindset, it is argued, has also been sustained via the procedures used to select and discipline judges. It is for this reason that when judges are seen as members of a former regime, from the perspective of the current political masters, that governments have actively sought to intervene in the Council to ensure a new alignment. Turkey also has a culture of creating special court systems outside of the ordinary judicial system, where the preferences of the executive are more easily reflected and executed by the judiciary, in particular against political opponents. The formation and functioning of the State Security Courts until their abolishment in 2004[63] and the role of the criminal courts with special powers which were abolished in 2014,[64] and the current operation of criminal peace judgeships, single judge courts with powers to detain individuals, and censor media, are three examples of this.[65]

As seen in the recent debacles, the feebleness of judicial independence as a shared value not only centers on the executive practices seeking to institutionally control the judiciary, but also, as in the case of Gulenist judges, a particular group or ideology hijacking and controlling the judiciary for their own political ends. It has now been officially acknowledged that the high-profile cases of *Ergenekon* and Sledgehammer ("*Balyoz*") which targeted members of the military, politicians, journalists and academics in the mid-2000s were sham trials organized by this network of judges. The police, prosecutors and the judiciary have been implicated in pursuing these trials without evidence and, in some instances, fabricating evidence. It was in response to this hijacking of the judiciary that the 2014 and 2017 changes to JSG were rolled back, increasing the power of the executive in judicial appointments. In the aftermath of the July 2016 failed coup attempt, the

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[62] Mithat Sancar & Eylem Ümit Atılgan, *"Adalet Biraz Es Geçiliyor…": Demokratikleşme Sürecinde Hakimler ve Savcılar*, TESEV 120-151, http://tesev.org.tr/wp-content/uploads/2015/11/Adalet_Biraz_Es_Geciliyor_Demokratiklesme_Surecinde_Hakimler_Ve_Savcilar.pdf.; MITHAT SANCAR, YARGININ BAĞIMSIZLIĞI VE TARAFSIZLIĞI:"DEVLET AKLI" KISKACINDA HUKUK DEVLETI (İletişim Yayınları. 2008); Vahap Coşkun, *Turkey's Illiberal Judiciary: Cases and Decisions*, 12 INSIGHT TURKEY 43(2010).

[63] Law no 5170 enacted on May 7, 2004 repealing article 143 of the 1982 Constitution.

[64] Law no 6526 enacted on March 6, 2014. *See* Hande Özhabeş, *Assessment on Changes Regarding the Specially Empowered Judicial System in Turkey*, TESEV PUBLICATIONS (2014) http://tesev.org.tr/wp-content/uploads/2015/11/Assessment_On_Changes_Regarding_The_Specially_Empowered_Judicial_System_In_Turkey.pdf.

[65] *Turkey: Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships*, Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), European Commission for Democracy through Law (Venice Commission), (Mar. 13, 2017) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)004-e.

government purged a quarter of the judiciary, indicating that they had connections to, or membership of, the Gulen movement.[66]

In Turkish legal literature, the dominant view, in terms of JSG arrangements, has been to support less of a role for the executive due to the lack of trust in the executive with to respect judicial independence. The role of the Ministry of Justice as the Chair of the Council since 1982 has, thus, been seen as violating the principle of judicial independence.[67] Although there have been some arguments favoring the attendance of the Minister at the meetings of the Council as the representative of the executive branch which is responsible for court administration and the justice system, the Chairmanship role has been contested due to its real and perceived impact on judicial independence.[68] The same concerns apply for the ex officio membership of the Undersecretary.[69] The reports following the advisory visits of the European Commission, and the reports of the Venice Commission, the Commissioner for Human Rights of the Council of Europe and the U.N. Special Rapporteur took the same line, opposing the position of the Ministry officials in the Council on the grounds that it would bring political influence.[70]

The problems posed by the existence of the Ministry in the Council were visible in the 2007 and 2010 crises when the Minister and the Undersecretary blocked the meetings of the

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[66] As the statistics of the Council dated July 26, 2016 shows, 15.304 judges and prosecutors were serving in the country. http://www.hsk.gov.tr/Eklentiler/Dosyalar/39c8a8cb-7600-4159-933b-48881447f0d4.pdf.

[67] Fazıl Sağlam, *AKP'nin Anayasa Değişikliği Paketi Üzerine Düşünceler*, 24 MÜLKIYE DERGISI 267 (2010); Muharrem Özen, *Yargı Bağımsızlığını Zedeleyen Düzenleme, Uygulamalar ve Bağımsızlığı Sağlamaya Yönelik Çözüm Önerileri*, 68 ANKARA BAROSU DERGISI 31 (2010); Burak Çelik, *Yargı Reformu: Hedefler, Sorunlar, Öneriler*, GÜNCEL HUKUK (2014); BURAK ÇELIK, HAKIMLER VE SAVCILAR YÜKSEK KURULU: YAPISAL AÇIDAN KARŞILAŞTIRMALI BIR İNCELEME (2012) [hereinafter BURAK ÇELIK, HAKIMLER VE SAVCILAR YÜKSEK KURULU].

[68] Cemal Baltacı, *Demokrasi ve Yargı Bağımsızlığı Bağlamında Türkiye'de Hakimler ve Savcılar Yüksek Kurulu*, 14 CUMHURIYET ÜNIVERSITESI İKTISADI VE İDARI BILIMLER DERGISI (2013).

[69] *Id.*

[70] Report by Thomas Hammerberg Commissioner for Human Rights of the Council of Europe, *Administrative of Justice and Protection of Human Rights in Turkey*, CommDH(2012)2, (Jan. 10, 2012), par. 104 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/0131_04/0131_04en.pdf; Gabriela Knaul, *Report of the Special Rapporteur on the independence of judges and lawyers: Mission to Turkey*, U.N. Doc. A/HRC/20/19/Add.3, (May 4, 2012), par. 32 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-19-Add3_en.pdf; Kjell Björnberg & Paul Richmond, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit* (28 September- 10 October 2003) http://www.abgm.adalet.gov.tr/avrupabirligi/turkyargisi/istisariziyaret/en/%C4%B0stisariZiyaretRaporu-2003-en.pdf; Kjell Björnberg & Paul Richmond, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit* (11-19 July 2004) https://ingel.home.xs4all.nl/ankara/advisory%20report%20II.pdf.

Council.[71] Before the 2010 amendments, the Council could not meet in the absence of the Undersecretary.[72] In 2007, the Council could not meet to elect the members of the Court of Cassation and Council of State because of a disagreement between the Ministry and the judicial members of the Council on that matter. In 2010, further disagreement occurred with respect to the appointments and promotions of criminal judges and prosecutors with special powers. The judicial members of the Council preferred to wait until the result of pending investigations against those judges and prosecutors were known, prior to appointments. The Ministry withdrew the draft decree and left the meetings. The Decree as proposed by the Ministry was adopted right after the 2010 amendments by the new Council.[73]

Some welcomed the 2010 amendments reducing the role of the Ministry into more of a symbolic presence, particularly by granting the Council institutional and budgetary autonomy.[74] The Venice Commission, too, welcomed several aspects of the 2010 amendments such as "the wide transfer of power from the Ministry of Justice to the HSYK, both as regards legal competences, staff and resources" and "the substantial reduction in the power and position of the Minister for Justice as President."[75] However, the Ministry, as the Chair of the Council, continued to hold important powers, such as to appoint the Secretary-General of the Council[76], and to authorize disciplinary investigations of judges.[77]

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[71] For a detailed examination of these crises *see* BURAK ÇELIK, HAKIMLER VE SAVCILAR YÜKSEK KURULU, *supra* note 67, at 193-197.

[72] This was due to Article 10/1 and 2 of the previous Law on the High Council of Judges and Prosecutors (Law no. 2461). All the members of the Council could be replaced by the substitute members during the meetings, except for the Undersecretary. Since he/she could not be replaced, and the whole Council constituted a quorum, the Council was not able to meet in the absence of the Undersecretary. *See* BURAK ÇELIK, HAKIMLER VE SAVCILAR YÜKSEK KURULU, *supra* note 67, at 233.

[73] BURAK ÇELIK, HAKIMLER VE SAVCILAR YÜKSEK KURULU, *supra* note 67, at 197.

[74] ERGUN ÖZBUDUN, TÜRK ANAYASA HUKUKU 394 (2016).

[75] Venice Commission, *supra* note 4, par. 27.

[76] Article 159/11 of the 1982 Constitution.

[77] Article 159/9 of the 1982 Constitution. Such powers have raised concerns regarding judicial independence in the reports of Thomas Giegerich after his peer review missions to Turkey. *See* Thomas Giegerich, *Peer Review Mission to Turkey: Report on Independence, Impartiality and Administration of the Judiciary* (Aug. 1, 2011) http://avrupa.info.tr/fileadmin/Content/Downloads/PDF/2011_Peer_Review_Report_on_the_Independence__Impartiality_and_Administration_of_the_Judiciary.pdf; Thomas Giegerich, *Peer Review Mission to Turkey: Report on the Turkish High Council of Judges and Public Prosecutors: Assessment of Its Initial Track Record of Operation*, (Feb. 4, 2013) http://typo3.p147163.mittwaldserver.info/fileadmin/Content/Files/DelegationDocuments/en/Report 04022013.pdf

The powers of the Ministry during the candidacy and pre-service training of judges, particularly the oral examinations are seen as a further negative impact on judicial independence. The law graduates who pass the written examination are subject to an oral examination to become eligible for candidacy. The Board which conducts the oral exam consists of seven members, and five of them are the high-ranking officers of the Ministry of Justice.[78] As of 2016, with the changes made on the powers of the Justice Academy, candidates are subject to a second oral examination again by a Board, which is dominated by members from the Ministry of Justice.[79] Besides the concerns regarding the objectivity of these oral examinations, making young graduates at the beginning of their judicial careers meet high-ranking officers from the executive serves to create the culture of a dependent judiciary.

The latest constitutional amendments of 2017 pose additional concerns over judicial independence regarding the role of the President of the Republic. The function of the President in the Turkish constitutional system dramatically changed after the 2007 constitutional amendments which paved the way for a popularly elected President.[80] As mentioned above, currently, the members of the Council are appointed by the President of Republic and the National Assembly. The Venice Commission in its recent report on the 2017 constitutional amendments highlighted a potentially dangerous scenario that would be seriously detrimental to judicial independence:

> The Commission finds that the proposed composition of the CJP is extremely problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President. It is important to stress once again in this respect that the President will no more be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing

[78] Article 9 (A)/6 of the Law on Judges and Prosecutors.

[79] *See* the discussions above under the title of "The Justice Academy of Turkey".

[80] Law no 5678, enacted on October 21, 2007 amending article 101 of the 1982 Constitution.

body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors.[81]

II. Judicial Self-Government and Judicial Accountability

The 2010 amendments to the composition and powers of the Council influenced de jure judicial accountability by changing the actors to whom judges are accountable. Before, although the disciplinary sanctions were imposed by the Council, supervision, inspection, and any inquiries on the conduct of judges were carried out by the inspectors of the Ministry. Therefore, both the Council and the Ministry were the main actors in terms of accountability. With the establishment of the Board of Inspectors within the Council, the role of the Ministry as an accountability actor has been weakened. However, the Minister as the Chair of the Council holds the power to authorize investigations against judges. Another remarkable development influencing de jure judicial accountability is the return of the appeal evaluation form in 2016. In addition to enforcing a new accountability mechanism, the senior judges have been brought to the scene again as additional accountability actors.

The processes and mechanisms through which judges are held accountable can be divided into four categories: i) judicial performance evaluation system, ii) transfer of judges, iii) disciplinary sanctions, and iv) criminalization of the judiciary.

First, judicial performance evaluation is an essential part of the promotion of judges resting on a two-tiered system. Once a year, judges' grades are advanced (a type of promotion based on seniority); and once in two years, their degrees are promoted (a type of promotion based on merit).[82] Time-lapses and the absence of any disciplinary sanctions are mutual requirements for both types. In addition to these requirements, for degree promotion, judges are evaluated based on their moral characteristics, professional knowledge, the quality and quantity of their work, the records and files prepared by the inspectors of the Council, their work reviewed by the supreme courts, and their in-service training.[83] The 2010 amendments made the Council the sole authority to regulate and govern the performance evaluation system by creating the Board of Inspectors. In addition,

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[81] Turkey: *Opinion on the amendments to the constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, Adopted by the Venice Commission at its 110th Plenary Session (Venice, 9-11 March 2017), European Commission for Democracy through Law (Venice Commission) (Mar. 13, 2017), par. 119.

[82] Article 18 of the Law on Judges and Prosecutors.

[83] Article 21 of the Law on Judges and Prosecutors.

the Council publishes its own principles, which set out the exact number and percentages of cases to be completed by different types of courts in one period of evaluation.[84]

Secondly, judges are accountable through transfer of judges by the Council. This mechanism can be regarded as an accountability perversion since it is a mechanism that is not formally an accountability mechanism but is misused in a way that makes judges more accountable.[85] Transfer of judges between districts derives from the socio-economic disparity between different regions of the country. Judicial organization in Turkey is divided into five districts which are ranked on the basis of financial and geographical conditions, and opportunities regarding transportation, health and cultural services.[86]

In principle, the transfer system is based on the period of service. The minimum period for service increases as the ranking of the district increases. While judges are required to stay a minimum of two years in the fifth district -the most inferior one-, the minimum period rises to seven years in the first district which includes more developed cities and municipalities.[87] However, these time requirements are not treated as absolute rules. The Council can decide to transfer judges in special circumstances.[88] First, judges who cannot serve in dignity and impartially, as expected from the service, can be transferred to another district of the same level. Secondly, judges can be transferred due to their failure to meet the requirements of expedition and success. Thirdly, the Council has the power to transfer a judge to an inferior district as a de jure disciplinary measure.[89] Apart from these special circumstances, judges themselves can request a transfer based on certain permissible factors limited to sickness, marriage, education, and natural disasters.[90] The Council has the discretion to deny these requests.

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[84] *See* Birinci Sınıfa Ayrılan ve Birinci Sınıf Olan Hâkim ve Savcıların Çalışmalarının Değerlendirilmesi Esaslarına İlişkin İlke Kararı (2017); Hakim ve Savcıların Derece Yükselmesi Esaslarına İlişkin İlke Kararı (2017).

[85] Transfer of judges as discussed here should not be confused with the change of location which is a formal disciplinary measure. The reasons for imposition of this measure are listed in Article 68 of the Law on Judges and Prosecutors.

[86] *See* Article 35/2 of the Law on Judges and Prosecutors; Article 2 of the Regulation on the Appointment and Transfer of Judges and Prosecutors.

[87] Article 3 of the Regulation on the Appointment and Transfer of Judges and Prosecutors.

[88] Article 7 of the Regulation on the Appointment and Transfer of Judges and Prosecutors.

[89] Article 68 of the Law on Judges and Prosecutors.

[90] Article 8 of the Regulation on the Appointment and Transfer of Judges and Prosecutors.

The Council is the sole authority on transfer of judges. Between 2011-2016, the Council decided on more than twenty-two thousand transfers with an average of 3154 each year (see Chart 1). The lists of transferred judges are published; however, they do not include information regarding the reasons for the transfers, or whether the transfer was requested by the individual judge or not. In the absence of any concrete reasons and any judicial remedy against the decisions of the Council, the power to transfer judges can be used as a de facto accountability mechanism by the Council. Judges can be transferred involuntarily without due regard to the above mentioned formal requirements.

Chart 1. Transfer of Judges (2011-2017)

Thirdly, the disciplinary sanctions are listed as (a) warning; (b) cut from salary; (c) condemnation; (d) suspension of grade advance; (e) suspension of degree promotion; (f) change of location; and (g) dismissal from profession.[91] The conditions that may result in the imposition of such disciplinary sanctions are also listed in the law. However, the vague wording of these conditions raises concerns. For instance, they include "improper conduct", "harming respect and trust required by the official position", "dressing inappropriately", "jeopardizing the harmony of the service."[92] The Venice Commission highlighted the risk that these broad and vague conditions "could be used to sanction a

[91] Article 62 of the Law on Judges and Prosecutors.

[92] Articles 62-69 of the Law on Judges and Prosecutors.

judge whose judicial decisions are disliked, without explicitly referring to such a motive."[93] The ECtHR case of *Özpınar v. Turkey* shows the impact of such vague wording on the private lives of the judges. In this case, a female Turkish judge was expelled from the office on the basis that she had engaged in "inappropriate acts and relationships detrimental to the dignity and respect of the profession", "wore too much make-up and dressed inappropriately", and was "creating an image that she did not respect her profession by acting based on her emotions".[94] These vague conditions still remain in the Law, and the subsequent Law on the High Council of Judges and Prosecutors also adopted them.

Dismissal from office - the heaviest disciplinary sanction available - has been widely used during the state of emergency which was declared on 21 July 2016 in the aftermath of the coup attempt on 15 July 2016. The first State of Emergency Decree, gave the power to the (High) Council on Judges and Prosecutors to dismiss those judges and prosecutors "who are considered to be a member of, or have relation, connection or contact with terrorist organizations or structures, organizations or groups established by the National Security Council as engaging in activities against the national security of the State."[95] Based on this provision, until October 2017, the Council dismissed 4279 judges and prosecutors in total for their alleged links with the Fetullahist Terrorist Organization.[96]

It must be noted that the Council issued nine decisions on the dismissals between August 2016 and May 2017, and each one has the exact same wording. The names of the judges and prosecutors dismissed are attached to each decision. The procedure applied in these decisions raised several concerns. First, it is not clear whether the conditions for dismissal are met in each individual case. Secondly, it is not known whether dismissed judges had an opportunity to defend themselves before the decisions are made pursuant to the procedural safeguards enshrined in the law.[97] Thirdly, the evidence put forward by the Council in these decisions are not individualized, but mainly composed of general knowledge about how the Gulenists infiltrated the judiciary. The Council indicated that it

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[93] European Commission for Democracy through Law (Venice Commission), (Mar. 29, 2011), par. 59 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-tr/dv/1128_17_/1128_17_en.pdf.

[94] Özpınar v. Turkey, App. No. 20999/04 (Oct. 19, 2010), http://hudoc.echr.coe.int/eng?i=001-101220.

[95] Article 3/1 of the State of Emergency Decree No. 667, enacted on July 23, 2016.

[96] High Council of Judges and Prosecutors General Assembly Decision No. 2016/426, 24/8/2016; Decision No. 2016/428, 31/8/2016; Decision No. 2016/430, 4/10/2016; Decision No. 2016/440, 15/11/2016; Decision No. 2016/434, 29/11/2016; Decision No. 2017/35, 13/02/2017; Decision No. 2017/113, 17/03/2017; Decision no. 2017/665, 3/4/2017; Decision No. 2017/682, 05/05/2017.

[97] Article 71 of the Law on Judges and Prosecutors sets out that no disciplinary action can be taken against judges in the absence of their defense. The judges shall be given at least three days for their defense.

used "information and documents in personal employment files, posts in social media accounts, complaints, reports, examination and investigation files about the related individuals, which were received by the High Council of Judges and Prosecutors."[98]

Lastly, the phenomenon of criminalization of the judiciary, although not directly related to the changes in JSG arrangements, inevitably increased not only the accountability of the individual judges, but of the judiciary as a whole, including the JSG bodies themselves. As announced by the Ministry of Justice in July 2017, after the coup attempt, 2431 judges and prosecutors are under detention based on their alleged membership of the terrorist organization. These include 105 members of the Court of Cassation, 41 members of the Council of State, 2 members of the Constitutional Court, and 3 members of the High Council for Judges and Prosecutors.[99]

III. Judicial Self-Government and Judicial Legitimacy

The quality of judges and the quality of the recruitment process are the main social legitimacy concerns with the judiciary in Turkey. Recent developments concerning the dismissals and criminal prosecution of hundreds of judges raised important discussions on the social dimensions of judicial legitimacy.

The hijacking of the judiciary by a particular sectarian group highlights that the recruitment, admission, and training of judges lack quality, objectivity, and transparency. The Council itself admits such deficiencies in its decisions on the dismissals.[100] As the Council indicated, the Fetullahist or Gulenist organization, with an aim to form a parallel state structure, used its members to infiltrate the military, security personnel, bureaucracy, and the judiciary. Accordingly, the organization had obtained the questions and answers of the written exams illegally and provided them to their members. They had been organized, particularly during the pre-service training period at the Justice Academy, and had stayed in clandestine houses together. The Council also argued that the members of this organization had been treated more favorably than others in terms of access to the education programs. They were also protected against disciplinary measures, and even used those measures to eliminate others who are outside the organization. The Council, at various parts in its decisions, confirmed that the Ergenekon and Sledgehammer cases were "fantasies" of this organization.

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[98] The English translation of the General Assembly decision can be found here: http://www.judiciaryofturkey.gov.tr/pdfler/hsyk_karar440.PDF.

[99] Hurriyet Daily News, More Than 154,000 faced legal probe over Gulen links since coup attempt (May 29, 2017) http://www.hurriyetdailynews.com/more-than-154000-faced-legal-probe-over-gulen-links-since-coup-attempt--113663

[100] *See* the High Council for Judges and Prosecutors General Assembly Decisions, *supra* note 96.

These decisions amount to the Council admitting that the previous Council which served from 2010 until 2014 "was mainly composed of FETO/PDY members." According to the Council, the organization took over the previous Council after the 2010 amendments which made the first category judges and prosecutors eligible for the Council's membership via peer elections. The opposing narrative, however, argues that this was possible only through an alliance between these judges and the AKP government.

The intensive measures taken to purge this sectarian group, however, did not put an end to the legitimacy concerns particularly regarding the quality and objectivity of the recruitment process. Since the quarter of the judiciary had been dismissed from the profession, the immediate response of the government to fill these positions has been to enable the candidate judges to be recruited, "regardless of the time they spent in the internship."[101] In addition, the minimum grade (70 points) necessary in the written examination to be eligible for the candidacy was removed.[102]

IV. Judicial Self-Government and Judicial Transparency

In Turkey, information is available and publicly accessible on matters of general court administration. The Ministry of Justice, the Council and the Academy issue online annual reports at the end of each year providing information about the activities of each administrative unit within these institutions, including the use and allocation of their own budget. The annual reports of the Council indicate the number of decisions issued by each chamber, the number of complaints received, gender segregated statistics on the personnel, and the number of judges and prosecutors admitted to the profession each year. Additionally, all these three institutions publish strategy plans for four year-periods.

Information regarding judicial transfers, appointments and evaluation criteria is also available. The Council sets the standards for appointments, transfers and performance evaluation through its own regulations and principle decisions which are easily accessible online. However, as discussed in the context of judicial accountability, information becomes less available and findable when it is personalized. In other words, while the information is available regarding the general standards for promotions, it is not possible to reach information about the specific reasoning behind the promotion of a particular

[101] Article 3/2 of the State of Emergency Decree no 667 (adopted on 23/7/2016).

[102] Article 6 of the State of Emergency Decree no 680 (adopted on 6/1/2017) amending article 9/A of the Law on Judges and Prosecutors.

judge. Even the individual judges themselves are not able to reach this information since some parts of information are kept in the confidential performance evaluation files.[103]

The major change regarding judicial transparency was brought in 2010 regarding the decisions on disciplinary measures. Before 2010, whether and which disciplinary measure was imposed to individual judges was not accessible publicly. In 2010, the Law on the Council for Judges and Prosecutors required the decisions on the disciplinary measures to be put on the website of the Council.[104]

V. Judicial Self-Government and Public Confidence in the Judiciary

In a jurisdiction like Turkey where there have been short-lived experiments concerning the governance of the judiciary, it is a difficult task to trace the impacts of each and every judicial development on public confidence.

The surveys conducted on the trust in the Turkish judiciary (see Chart 2 and Chart 3, below) provide differing findings, but share a common result. Between 2010 and 2013, there was a decline in the percentage of trusting respondents. This decline may be the result of the 2010 constitutional amendments which brought radical changes in the judiciary, notably on the composition and powers of the Council, and the Constitutional Court. The narrative regarding these changes as a court-packing plan might have influenced public perception. On the other hand, an alternative narrative would argue that these surveys corresponded with the period when the judiciary was being controlled by the Gulenist organization, and when the mega cases, like Ergenekon and Sledgehammer, were still ongoing.

[103] Article 59 of the Law on Judges and Prosecutors.

[104] Article 32 (4) (b) of the Law on the Council for Judges and Prosecutors.

Chart 2. Trust in the Turkish Judiciary (I)

Chart 3. Trust in the Turkish Judiciary (II)

Source: Kadir Has University Social and Political Inclination Survey (2010-2016)

D. Repercussions of Judicial Self-Government for the Principle of Separation of Powers and the Democratic Principle

The composition and powers of the Council and the Academy, and how their members are appointed or elected have had significant repercussions on the debates concerning the principle of separation of powers in Turkey. The ambiguous position of the Council and whether it is part of the judiciary as such or an extension of the administrative branch attracted much attention. Debates on the democratic principle, on the other hand, have focused on whom the Council represents – junior or senior members of the judiciary - and to what extent it enjoys democratic legitimacy.

I. Separation of Powers

The establishment of the Judicial Council and the insulating of powers related to the career of judges from the domain of the executive is a major development in ensuring the formal separation of powers in Turkey. Although this separation was blurred with the inclusion and ex officio memberships of the Minister and the Undersecretary to the Council in 1971 and 1982 respectively, the institutional and budgetary autonomy brought by the 2010 amendments further strengthened the separation between the judiciary and the executive. The 2010 amendments, however, were also described as informally increasing the control of the executive over the Council. Serious criticisms were raised with respect to the election of the first category judges and prosecutors among their peers. It was argued that the right of junior judges to stand for election to the Council would make them more dependent on the executive at the beginning of their career, and could result in them being easily manipulated.[105] It was also seen as a part of the Justice and Development Party's alliance with junior judges against senior judges who were perceived as biased against the government.[106]

The Constitution regulates the Council under the general title of "judicial power". Once set up, the Council exercises its functions "in accordance with the principles of the independence of the courts and the security of the tenure of judges."[107] However, upon closer look the Council also serves administrative functions when abolishing a court or

[105] Fazıl Sağlam, *supra* note 67; LEVENT GÖNENÇ, DÜNYADA VE TÜRKIYEDE YÜKSEK YARGI KURULLARI (2011).

[106] Ayşe Aslıhan Çelenk, *The myth of 'independent judiciary': the evolution of judiciary-executive relations in Turkish politics*, 22 CONTEMPORARY POLITICS 232, 243 (2016).

[107] Article 159/1 of the 1982 Constitution; Article 1 of the Law on the High Council of Judges and Prosecutors.

changing the territorial jurisdiction of a court.[108] The 2014 legal changes also enabled the Council to issue regulations and circulars on judicial matters.[109]

Despite the significant judicial and administrative powers, most decisions of the Council are not subject to judicial review. In the pre-2010 period, all the decisions of the Council were left outside the scope of judicial review.[110] The 2010 amendments set out that only the decisions of the Council concerning the dismissal of judges are subject to judicial review.[111] The limited scope of the judicial review of the Council has been criticized by Turkish scholars as well as the Venice Commission.[112] The lack of judicial review of the decisions of the Council also means that the decisions of the Minister of Justice acting as the Chair of the Council cannot be reviewed by courts. Neither the Constitution nor the Law on the High Council of Judges and Prosecutors clarify whether the Council is an administrative organ or not. The Council may even be described as a super-administrative organ since most of its decisions are not subject to judicial review.

II. Democratic Principle

The Council had a hierarchical co-option model until the 2010 constitutional amendments, meaning that it was composed only of senior judges. Several scholars opposed to the composition of the Council in such a way, argued that it results in a "caste system"[113] and "judicial technocracy."[114] It was also argued that the co-option model "facilitated the imposition of an ideological litmus test on judicial promotions, ensuring that the high judiciary was a relatively politically homogeneous group."[115] Based on similar concerns, the

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[108] Article 159/8 of the 1982 Constitution.

[109] Article 7/2(ı) of the Law on the High Council of Judges and Prosecutors as amended by the Law no. 6524.

[110] Prior to 2010, the only remedy to challenge the decisions of the Council was an internal commission within the Council. However, the commission was not considered as an effective remedy by the European Court of Human Rights. *See* Kayasu v. Turkey, App. No. 64119/00 and 76292/01, (Nov. 13, 2008), http://hudoc.echr.coe.int/eng?i=001-89606; Özpınar v. Turkey, *supra* note 94.

[111] Article 159/10 of the 1982 Constitution.

[112] BURAK ÇELIK, HAKIMLER VE SAVCILAR YÜKSEK KURULU, *supra* note 67, at 353; *Interim Opinion on the Draft Law on Judges and Prosecutors of Turkey*, CDL-AD(2011)004, Venice Commission, *supra* note 93, par. 76; *See* also Venice Commission (2010), *supra* note 4, par. 55.

[113] Serap Yazıcı, *Turkey's Constitutional Amendments: Between the Status Quo and Limited Democratic Reforms*, 12 INSIGHT TURKEY (2010) http://file.insightturkey.com/Files/Pdf/insight_turkey_vol_12_no_2_2010_yazici.pdf.

[114] Cemal Baltacı, *supra* note 68.

[115] Aslı Bâli, *supra* note 34.

2010 amendments brought a more pluralistic and non-hierarchical model for the Council and thus arguably democratized the formation of the Council.

The 2017 amendments envisage the President and the Parliament sharing the task of the formation of the Council. Several scholars have suggested that having members elected by the Parliament would make the Council democratically legitimate.[116] They argued that this has been recommended by the Consultative Council of European Judges (CCEJ). However, it is not the case.[117] According to the CCEJ,

> If in any state any non judge members are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society.[118]

The 2017 constitutional amendments granted the power to the National Assembly to elect seven members of the Council, four from the judiciary, and three among the lawyers and law professors. The procedure prescribed by the Constitution is as follows:

> The Joint Committee shall elect three candidates for each vacancy with a two-thirds majority of total number of members. If the procedure of electing candidates cannot be concluded in the first round, a three-fifth majority of total number of members shall be required in the second round. If the candidates cannot be elected in this round as well, the procedure of electing candidates shall be completed by choosing a candidate by lot, for each membership among the two candidates who have received the highest number of votes. The Grand National Assembly of Turkey shall hold a secret ballot election for each candidate the Committee has identified. In the first round a two-thirds majority of total number of members shall be required; in case the election cannot be concluded in this round, in the second round a three-fifth majority of total number of members shall be required. Where the member cannot

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[116] Serap Yazıcı, *Yüksek Yargı Konseylerinin Oluşturulmasında Demokratik Temsil İlkesi*, *in* Yarginin Bağımsızlığı, Tarafsızlığı ve Etkililiği (Ahmet Taşkın ed. 2009); Yusuf Şevki Hakyemez, *Hakimler ve Savcılar Yüksek Kurulu*, *in* Stratejik Düşünce Enstitüsü Yargı Raporu: Demokratikleşme Sürecinde Yargı Kurumları (2010).

[117] Burak Çelik, Hakimler ve Savcılar Yüksek Kurulu, *supra* note 67, at 129.

[118] Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (Nov. 23, 2007), par. 32.

> be elected in the second round as well, the election shall be completed by choosing a candidate by lot among the two candidates who have received the highest number of votes.[119]

Regarding the non-judge members, it can be said that the procedure is compatible with the opinion of the CCEJ as it included a qualified majority until the last round. It should be noted that the recommendation of the CCEJ concerns the non-judge members. The judge members, on the other hand, are recommended to be elected by their peers.[120] The system brought by the 2017 amendments also allows the parliament to elect four members from within the judiciary. This option posed serious concerns that the election by the parliament would politicize the judiciary. It has been argued that the involvement of the Parliament in the elections would incentivize judges to build close relationships with parties, and act based on their interests after he or she got the membership.[121]

E. Conclusion

In this article we argued that JSG experimentalism in Turkey is linked to critical constitutional junctures in Turkish politics and is a manifestation of the high, but shifting, political stakes. The judicial powers have been vested in a Council since 1961 with the aim of insulating judicial matters from the executive domain, but the composition and the powers of the Council have seen significant changes over time. The Justice Academy has also not been safe from this experimentalism as it has experienced two major changes, only ten years after its establishment.

It has, therefore, been suspect, whether the different forms of JSG have promoted judicial independence, given the highly politicized conditions that led to many of the JSG reforms. The changes on the Council – except the financial and institutional autonomy introduced in 2010 – has often been seen as interfering with judicial independence due to the increased role of the Ministry of Justice. The concerns over judicial independence also exist regarding the changes to the Justice Academy, increasing the influence of the Ministry over the recruitment process. In the context of the 2017 constitutional reforms, which have moved Turkey from a parliamentary democracy to a form of presidentialism, where the power is highly centralized in the hands of a partisan leader, credible doubts exist regarding the Council's independence from the executive**.**

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[119] Article 159/3 of the 1982 Constitution as amended on April 16, 2017.

[120] Opinion no. 10 (2007) of the CCEJ, *supra* note 116, par. 27.

[121] These concerns have been raised even before the 2017 amendments in Fazıl Sağlam, *supra* note 67; Muharrem Özen, *supra* note 67.

Judicial accountability continues to be based on the centralized system of performance evaluation, transfers, and disciplinary supervision. Except for the power of the Minister of Justice to authorize disciplinary investigations, the Council stands as the most powerful actor holding individual judges accountable. In more recent times, the decisions of the Council on dismissals and criminal prosecutions, under the state of emergency regime, have changed the processes through which judges and the judiciary are held accountable. The infiltration of the judiciary by a group, followed by the purge of the quarter of the judiciary, including the members of the Council, has undoubtedly had effects on judicial legitimacy and public confidence.

The different models of JSG ranging from co-option or pluralistic, to hierarchical or non-hierarchical have had implications for the democratic principle. The power vested in the Parliament to elect the members of the Council by the recent constitutional amendments revived the debates on whether that would increase the democratic legitimacy or politicize the judiciary.

Articles

Romania: Perils of a "Perfect Euro-Model" of Judicial Council

By Bianca Selejan-Guțan[*]

Abstract

The last three decades have brought important changes to the Romanian judicial system, especially concerning the struggle for independence and autonomy within the separation of powers equation. The internal and external context – i.e. the transition to democracy, after 1989, and the intention to join the European Union – determined an orientation towards the "Euro-Model" of judicial self-government. This has not come without difficulties and perils, both from the inside and from the outside. The article provides a comprehensive analysis of the Romanian system of judicial self-government in the context of these perils and emphasizes the link between the attempts to reinforce judicial independence and the anti-corruption fight, required by the supervision mechanism under which Romania has been placed at the moment of the EU accession. The increase in the number and intensity of such perils in the recent period has coincided with an increase in the number of high-level political corruption cases that have resulted in convictions. The article also discusses recent changes in the laws of the judiciary, which still are, partially, under parliamentary scrutiny, but which have raised serious concerns at the European level, as regards the progress made by Romania in achieving the objectives included in the Cooperation and Verification Mechanism.

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A. Introduction

In the last 29 years, the Romanian judiciary has been caught in a permanent struggle for independence. In the post-communist period, several reforms took place, at both the constitutional and legal levels. In this context, the main Romanian judicial self-government body – the Superior Council of Magistracy (hereinafter SCM) – has been has been subjected to the most important transformations of all constitutionally entrenched institutions since its establishment in 1991. Re-introduced in the Constitution after the fall of the communist dictatorship, the SCM became the main guarantor of the independence of the judiciary and has been seen as one of the main instruments of fighting against endemic corruption in Romanian society, under European supervision.

In this difficult external and internal context, the shift from a weak judicial council dominated by the executive power through the minister of justice to an autonomous body with enormous influence within the judicial system has been seen as a normal response to external pressures from the EU as well as a potential 'miraculous' solution to the main goals pursued by the unique placement of the country under European formal supervision through the Co-operation and Verification Mechanism: a stronger independence of justice and a fight against corruption. As the anti-corruption measures increased, including the creation and reinforcement of the powerful Anti-Corruption Directorate, going hand-in-hand with the increasing autonomy of the judiciary as a whole, through the SCM, external and internal perils started to become more and more evident: political statements against the judiciary, attempted changes of legislation, media scandals, but also internal issues such as corruption, conflicts between judges and prosecutors within the SCM, a small degree of transparency and unstable public confidence.

The constitutional law and socio-legal scholarship has emphasized some of the shortcomings of a too autonomous and corporatist judicial self-government system. Garoupa & Ginsburg[1] first argued that a strong judiciary should also be politically accountable, but this opinion is to be carefully limited as to the degree of purely "political" accountability in an emergent democracy with illiberal tendencies. The same authors also warned about the judicial council being "targets of institutional reform". As for the Romanian context, Tănăsescu & Popescu advocate for the reform of the Romanian SCM, invoking the lack of transparency and accountability, as well as for a "necessary moral and ethical purging of its members"[2], while Bogdan Iancu claims that "the translation of this institutional form may just as well produce different abnormalities" in the context of an

[1] Nuno Garoupa, Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence,* in 57 AMERICAN JOURNAL OF COMPARATIVE LAW 130–131 (2009).

[2] Elena-Simina Tănăsescu, Ramona Popescu, *Romanian High Judicial Council – Between Analogy of Law and Ethical Trifles,* in 36 TRANSYLVANIAN REVIEW OF ADMINISTRATIVE SCIENCES 173 (2012).

"opaque corporatist structure".[3] Cristina Părău, on the other hand, acknowledges that "judicial reform in Romania has been driven by strategic motives informing the process of EU accession as well as by domestic power struggles".[4] While I mostly agree with all these opinions, I also think that they should be put in the unique perspective of the Romanian internal and external context. For example, the "eternal struggle for a balance between independence and accountability"[5] seen by Garoupa & Ginsburg as the main locus for institutional reform, has, in the Romanian case, interesting implications on the position of the Council towards the other state powers. The answer to the question "Is Romania a perfect model of JSG?" could only come from an integrated evaluation of all of the advantages, shortcomings and perils of the system, in the internal and external context of a continuous need for reform. In this article, without any claim to being exhaustive, I am offering an account of the features of the Romanian judicial self-government system from a constitutional law standpoint. Shortcomings and challenges will also be emphasized, with a view to establishing whether the current system should be considered to be adequate and, consequently, be strengthened, or, on the contrary, whether it should be changed to a less autonomous one.

I will try to point out that the actual perils to the Romanian judiciary as a whole are, in fact, a response to its "normal" functioning, especially in the anti-corruption field. The increase in the number and intensity of such perils in the recent period has coincided with an increase in the number of high-level political corruption cases that have been prosecuted and have resulted in convictions. Therefore, the pressures from the political sphere, especially the repeated attempts to change legislation in order to weaken judicial independence (i.e. of judges and prosecutors), were all the more intense. This situation raised the concerns of international actors, such as the European Commission and the Venice Commission[6] and proved that the system should increase its independence from political power. To the concerns regarding the risks of excessive corporatism, I would argue that the system can be self-regulatory and can remove the unwanted effects on its own, if the legislation assures the proper guarantees for a true judicial independence.

The article is organized into three main parts: the first part includes a presentation of the Romanian judicial system and of the reasons why the judicial council model was adopted

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[3] Bogdan Iancu, *Perils of Sloganised Constitutional Concepts Notably that of 'Judicial Independence',* in 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 599 (2017).

[4] Cristina Părău, *The Drive for Judicial Supremacy,* in JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed., 2015) 665.

[5] Garoupa&Ginsburg, *supra* note 1 at 105.

[6] Venice Commission, *Romania. Preliminary Opinion on Draft Amendments to Law no. 303/2004 on the Statute of Judges and Prosecutors, Law no. 304/2004 on Judicial Organization, and Law no. 317/2004 on the Superior Council for Magistracy*, CDLPI(2018)007 of 13 July 2018, §51, and esp. §§160–161.

and subsequently consolidated; the second part assesses the external and internal perils that confront the judicial self-government, from a constitutional perspective, including the gap between the degrees of independence and accountability of the judiciary; the third part examines whether the judicial council model itself can be considered a threat to constitutional principles and values – particularly, to the separation of powers and democracy – due to the ever-increasing insulation from subordination to other branches of government. The necessity and shortcomings of the most recent legislative changes will also be addressed, as will the increasing awareness in civil society of the need for an independent judiciary.

Is excessive judicial self-government perilous to the rule-of-law? In my opinion, although the criticisms against the 'corporatization' of the system are partly justified, this 'excessive autonomy', established as a reaction to the high level of corruption that plagues the Romanian society, can be considered "the lesser evil" in the equation. The peculiar situation of Romania – placed under EU supervision ever since the accession because of the serious flaws of the judiciary and of the high degree of official corruption – is a strong argument in this direction. Should the SCM disappear or should its powers be diminished, in a troubled political context with clear tendencies towards illiberalism, these European goals would be under a major threat. That is why I try to demonstrate that the current system should be maintained, with some amendments regarding transparency and accountability (based on clear and predictable legal provisions). Therefore I conclude, in line with Garoupa & Ginsburg, that "judicial councils remain attractive institutions"[7] but that, in the end, there is no "perfect model" of judicial self-government.

B. The Romanian Judicial System and the Rationales of Judicial Self-Government

It must be stressed from the outset that the current position and influence of the SCM are the result of an evolution that was strongly influenced by the tensions generated in the context of the EU accession and of the internal fight with endemic corruption. To better understand the peculiarities and the rather unique situation of Romania in the European context, it is necessary to examine the Romanian judicial system and the background of its judicial self-government.

The Romanian judicial system is a classic 'Continental'-type one,[8] with a single order of jurisdiction,[9] which comprises courts of the first instance (*Judecătorii*), secondary courts (*Tribunale*), courts of appeal and the High Court of Cassation and Justice (hereinafter HCCJ) as the apex court. The Constitutional Court, established by the 1991 Constitution, is not

[7] Garoupa & Ginsburg, *supra* note 1 at 103.

[8] For details, see Bianca Selejan–Guțan, THE CONSTITUTION OF ROMANIA. A CONTEXTUAL ANALYSIS (2016) 181–182.

[9] There are no special administrative courts.

part of the judiciary, but an institution independent from the other state powers. One peculiarity of the system is that, according to the Constitution, the "judicial authority" (Chapter 3 of the 3rd Title – *Public Authorities*) includes, besides the courts, the "Public Ministry" – i.e. the prosecutors, organized in prosecutors' offices (*Parchete*) and the Superior Council of Magistracy, which represents the whole "order" of magistrates. The prosecutors are considered magistrates within the meaning of the Law on the Status of Magistrates and have similar rights as judges, but there are also significant differences: prosecutors are not irremovable, they are placed "under the authority" of the Minister of Justice and are under hierarchical control.[10] These features led the European Court of Human Rights to rule, in 2003, that prosecutors are not to be considered 'magistrates' within the meaning of the Convention's Articles 5 and 6 and therefore their power to decide on pre-trial detention was considered a breach of the right to liberty and security.[11]

The constitutional principles of the judiciary are: independence and impartiality, the prohibition of extraordinary tribunals, the right to appeal, the official language (Romanian) – with the possibility of persons belonging to national minorities to use their mother tongue in special conditions.[12]

The judicial culture in Romania is not significantly different from other post-communist countries in the region. As pointed out in the scholarship, at the beginning of the transitional period, "despite their strong political commitment to European integration, CEE candidates, their national judiciaries, proved to be poorly methodologically equipped to face the burden of European integration."[13] Among the weaknesses emphasized by the author, were "textual positivism, (…), reluctance towards the binding legal precedent (…), mechanical jurisprudence, rudimentary descriptive approach (…), ignorance towards persuasive arguments and soft law, disregard of comparative law",[14] but also "formalist reading of the law and misunderstanding of precedent".[15] Although Romania, like all other CEE countries, has been subjected to a process of 'Europeanization' since the early stages of pre-accession, the actual changes in legislation and mentality occurred in slow motion

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[10] Selejan-Guțan, *supra* note 8 at 186.

[11] Following the ECtHR judgment *Pantea v. Romania,* in 2003, the Romanian Constitution was amended so that only a judge can decide on preventive detention and the prosecutors lost this power.

[12] Articles 124–128 CR.

[13] Manuel Guțan, *Judicial Culture as Vector of Legal Europeanization,* in EUROPEANIZATION AND JUDICIAL CULTURE IN CONTEMPORARY DEMOCRACIES (Manuel Guțan, Bianca Selejan–Guțan ed., 2014).

[14] *Ibid*. *See* also Bianca Selejan–Guțan, *Transitional Constitutionalism and Transitional Justice in Postcommunist States – The Romanian Case* in 2 ROMANIAN JOURNAL OF COMPARATIVE LAW 289–90 (2010).

[15] Zdenek Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement* in 52 AMERICAN JOURNAL OF COMPARATIVE LAW 550 (2004).

and following external pressures. It is also relevant that Romania did not undergo a process of lustration,[16] as regards either politicians or members of the judiciary. Thus, at least in the first decade after the fall of communism, the judiciary had virtually the same composition, with no or little background of liberal principles such as equality, rule of law, legal certainty, constitutionality, or human rights. In this context, another peculiarity of the Romanian early post-communist judicial culture was a low willingness to evolve towards the new democratic values. The most effective instruments to trigger progress were, on the one hand, the case-law of the European Court of Human Rights[17] and, on the other hand, the EU accession and especially the Co-operation and Verification Mechanism (hereinafter CVM), established "to improve the functioning of the legislative, administrative and judicial system and to address serious deficiencies in fighting corruption".[18]

One of the first steps in changing the judiciary after decades of undemocratic regime was the reintroduction of the Superior Council of Magistracy/ *Consiliul Superior al Magistraturii* (hereinafter SCM), by the 1991 Romanian Constitution (hereinafter CR), after 42 years of absence. The SCM was established as the main judicial self-government body in Romania and it used its French counterpart an institutional rather than normative or functional model. The actual operation of the post-communist Council started in 1992, when the Law on Judicial Organization was enacted. Following the constitutional amendment of 2003, the Council was redesigned by the constitutional text and in 2004 a special organic law entirely dedicated to the "new" SCM was enacted – Law no. 317/2004 (hereinafter LSCM).

Despite its strong formal entrenchment, the judiciary and its independence were among the main weak links emphasized in the context of Romania's EU accession. This was mostly due to the high level of corruption in the political and administrative systems and to the apparently low involvement of the judiciary in the fight against this corruption in the first post-communist decade. Therefore, the European Commission set, as imperative pre-accession requirements, the establishment of strong institutions endowed with these competences. As a result, within the General Prosecution Office of the HCCJ was created,

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[16] The only prohibition to occupy leading positions or positions in the SCM is for judges and prosecutors who were part of intelligence services before 1990 or who collaborated with these services (the old political police – *Securitate*). The National Council for the Study of *Securitate*'s Archives (CNSAS) gives affidavits to certify this condition. *See* also Părău, *supra* note 4 at 641.

[17] Bianca Selejan-Guțan, *Human Rights – An Element of the European Judicial Culture,* in Guțan, Selejan-Guțan, *supra* note 12 at 214.

[18] As provided by Article 37 of the Act of Accession of Romania to the EU (2005) and by Commission Decision of 13 December 2006 (2006/928/EC), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:354:0056 :0057 :EN:PDF. The first benchmark was to "ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy." See also COM(2007) 378 final, *Report from the Commission to the European Parliament and Council on Romania's progress on accompanying measures following accession* 2.

in 2002, the "Anti-Corruption National Prosecution Office" – nowadays the "Anti-Corruption National Directorate" (hereinafter DNA). Since its creation, the DNA's case-load has gradually increased. The institution has been under the constant eye of the European Commission, especially Romania's accession in 2007,[19] through its progress reports in the framework of the CVM. In this context, the reinforcement (in the pre-accession period) and the activity of the SCM and of the DNA were seen by the European actors as the flagships of judicial reform, alongside legislative measures intended to increase the quality and independence of justice in Romania (including accountability and transparency). Thus, in the view of the European authorities, a reinforced judicial self-government body must go hand-in-hand with a more powerful anti-corruption body.

In this context, two main peculiarities of the Romanian system must be stressed:
a) The strong position of the prosecutorial part of the judiciary within the system, which comes partly from its communist heritage (the prosecutors' offices were very powerful during the communist regime and also politically controlled as a part of the communist party's system of political repression[20]); that is why, prosecutors are considered 'magistrates' by the law, on an equal footing with judges. A major part of the discussion around the independence of the judiciary in Romania revolves around prosecutorial activity.

b) A significant part of the major debate regarding the efficiency of the judiciary focuses on corruption, which is seen as one of, if not the, main weaknesses of the Romanian society and political system. This also reflects on the public perception of the judiciary.

I. The Superior Council of Magistracy: Creation, Composition and Powers

Although the literature usually acknowledges France to be the first country to introduce a high judicial council, in 1946, Romania had created such an institution in 1909. The first Romanian SCM was an advisory body regarding the careers of magistrates, the decision-making authority being the minister of justice. It also had the competence to rule on disciplinary motions against magistrates. In 1924, the Law on Judicial Organization redesigned the SCM by removing its powers as a disciplinary court and by placing it under the authority of the minister of justice. In 1938, there were important structural changes related to the political regime (a "royal dictatorship" with strong nationalistic undertones two judicial councils were created, one for the proposals to the supreme court and one for the proposals of judges and prosecutors to the other courts, both under the authority of the minister of justice and without any disciplinary powers. In 1952, under the communist rule, the institution ceased to exist.

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[19] *See*, for details, Selejan-Guțan, *supra* note 8 at 190.

[20] *See* also DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016) 23.

This brief historic account reveals a certain tradition of the "judicial council model" in Romania, in a more "hybrid" form (a consultative judicial council combined with the strong decision-making role of the minister of justice).[21] Therefore, the reinstatement of the Superior Council of Magistracy in 1991, this time at the constitutional level, was seen as an important move on the path of breaking with the totalitarian past and of reconnecting to the 'democratic traditions' of the country. The constitutional entrenchment did not fully follow the previous model, leaving the task to define the actual role of the SCM to subsequent legislation. In some views, at the moment of the Constitution's drafting, "there was no particular vested interest in an independent judiciary and perhaps a general undefined political interest against it".[22] This opinion is validated by the fact that, in 1997, the decision-making powers of the SCM were removed in favour of the minister of justice.

Following external pressure from the European Commission (in the light of the projected accession of Romania to the European Union), the constitutional and legal design of the SCM were fundamentally changed in 2003, through a constitutional amendment which instated the judicial council model in its pure form, i.e. entrenching the total autonomy of the high judicial council from all state powers, in its decisions regarding the careers of magistrates and disciplinary motions against them.[23]

During the debates on the draft Constitution (1990-91), there were other proposals on the JSG. For example, one proposal was to create a high judicial council composed of magistrates who are, at the same time, members of Parliament, under the presidency of the Minister of Justice.[24] The final draft supported the version of a Superior Council of Magistracy composed of magistrates elected by the chambers of Parliament. Some further amendments were proposed: to remove the Council from the Constitution; to include deputies and senators in the Council, in addition to magistrates; to provide that the President of the Supreme Court is also the President of the SCM.[25] All these amendments were rejected, some under the motivation that "the solution from the draft is in accordance with the political decision of the Constituent Assembly".[26] There was no actual public debate on this issue at the moment of the adoption of the Constitution, but the

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[21] Michal Bobek, David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe,* in 15 GERMAN LAW JOURNAL 1266 (2014).

[22] Bogdan Iancu, *Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania* in 6 EUROPEAN CONSTITUTIONAL LAW REVIEW 38 (2010).

[23] *See* also SEBASTIAN SPINEI, ORGANIZAREA PROFESIILOR JURIDICE LIBERALE (2010) 23.

[24] Viorel Mihai Ciobanu, *Articolul 133,* in CONSTITUTIA ROMANIEI. COMENTARIU PE ARTICOLE (Ioan Muraru, Elena Simina Tănăsescu ed, 2008) 1261.

[25] GENEZA CONSTITUȚIEI ROMÂNIEI. LUCRĂRILE ADUNĂRII CONSTITUANTE (1998) 669.

[26] *Ibid*.

2003 constitutional amendment process included the reform of the SCM as a major point of debate.

From the outset, the SCM was included in the third Title of the Constitution (Chapter 6 – *Judicial Authority,* Section 3 – *Superior Council of Magistracy*). In 1997, the organic law expressly recognized the Council as a 'component of the judicial authority', after amending the Law on Judicial Organization.[27] The 1991 SCM was composed of magistrates (i.e. judges *and* prosecutors) elected, for a period of 4 years, by the two chambers of the Parliament. The actual composition was detailed in the Law on Judicial Organization (Article 72): 15 members, out of which there were 4 judges of the Supreme Court of Justice, 3 prosecutors of the General Prosecution Office of the Supreme Court, 6 judges of the Courts of Appeal, and 2 prosecutors of the Prosecution Office of the Bucharest Court of Appeal. The candidates to these positions were proposed by each court, as provided by the law, through the general assemblies of magistrates.

In 2003, the constitutional 'Euro-amendments' significantly changed the composition and role of the SCM. Firstly, it became almost totally autonomous and the term of office was extended from 4 to 6 years. The Constitution expressly set the role of the SCM as "guarantor of the independence of justice". Secondly, the composition of the Council increased. Thus, according to Article 133 (2) "the Superior Council of Magistracy shall consist of 19 members, of whom: a) 14 are elected in the general meetings of the magistrates and validated by the Senate; they shall belong to two sections, one for judges and one for public prosecutors; b) 2 representatives of the civil society, specialists in law, who enjoy a good professional and moral reputation, elected by the Senate; these shall only participate in plenary proceedings; c) the minister of justice, the president of the High Court of Cassation and Justice and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice". Although a member of the Council, the minister of justice has a significantly diminished actual role. The constitutional text sets forth more precise provisions on the Council's leadership: "the president of the SCM shall be elected for a one-year's term of office, which cannot be renewed, from among the magistrates listed under para. 2 (a)". The minister of justice is not the only member of the executive power that was given a role within the SCM. The amended constitutional text gave the President of Romania the right to take part in the proceedings of the Council and the role of presiding over the SCM meetings in which he or she participates, but with no right to vote.

[27] Law no. 142/1997.

Table 1. Composition and leadership of the post-communist Romanian SCM, from the draft Constitution to the current version.

Act	Composition	Leadership
Draft Constitution (1990-91)	Various proposals. E.g. magistrates who are also MPs; magistrates elected by parliament.	Various proposals. E.g. minister of justice to be the president of the SCM.
Constitution of 1991 (original version, in force until 2003)	15 magistrates (judges and prosecutors), elected by Parliament, only from upper courts (Supreme Court, Courts of Appeal)	No SCM president elected. President of the Supreme Court of Justice and the Minister of Justice presided over some of the meetings.
Constitution of 1991, amended in 2003	19 members: 14 magistrates (judges and prosecutors), elected by their peers, from lower and upper courts; 2 representatives of the civil society (no right to participate and vote in the sections); President of the High Court of Cassation and Justice, Prosecutor General, Minister of Justice (no right to vote in certain cases).	SCM President elected for a one-year term, non-renewable, with the vote of all members of the plenum. The President of Romania chairs the meetings in which he or she participates.

As regards the composition of the Council, it is worth pointing out its "anti-hierarchical tilt",[28] due partly to the rules on election of its members, whereby most of the candidates come from lower courts, and to the rules of composition, according to which three out of five elected prosecutors and four out of nine elected judges represent the lowest courts/prosecutors' offices. It is interesting that, although the ratio of magistrates decreased from 100% to 84.2% in the new Council, the autonomy of the Council increased. In 2014, a proposal to increase the number of the representatives of the civil society from 2 to 4, included in the draft law amending the Constitution, was declared unconstitutional by the Constitutional Court, on grounds that "the change of the representation proportion, by increasing the number of persons from outside the judiciary, would produce negative effects on the activity of the judicial system".[29]

The powers of the Council were provided by the first version of the Constitution in a general manner and detailed in the Law of Judicial Organization. Thus, according to former Article 133 CR, the SCM "shall nominate judges and public prosecutors for appointment by the President of Romania, except for the trainees, in accordance with the law. In this case,

[28] Bogdan Iancu, *supra* note 3 at 594.

[29] RCC, Decision 80/2014. For comments and details, *see* Bogdan Iancu, *Standards of good governance and peripheral constitutionalism. The case of post-accession Romania,* in SOCIOLOGY OF CONSTITUTIONS: A PARADOXICAL PERSPECTIVE (STUDIES IN THE SOCIOLOGY OF LAW (Alberto Febbrajo, Giancarlo Corsi ed, 2016) 191 et seq.

the proceedings shall be presided over by the minister of justice, who shall have no right to vote." Secondly, the SCM had the role of disciplinary court for judges and prosecutors, "in which case proceedings shall be presided over by the President of the Supreme Court of Justice". These powers were actually exercised independently by the Council for only 5 years, until the legislative changes of 1997. From 1997 to 2004, all the powers of the SCM were exercised either 'at the recommendation' or 'following the proposal' of the minister of justice, which meant that the executive had the decisive word as regards the magistrates' careers. Moreover, the Law on Judicial Organization also provided that 'the minister of justice has a right to control the activity of judges', including a 'right to introduce disciplinary actions', which meant a strong interference with the principle of separation of powers and the independence of justice.[30] Thus, although the formal constitutional powers regarding the magistrates' careers belonged to the SCM, the law restrained these powers and, implicitly, the Council's independence, by granting the minister of justice the informal role of supervising the whole activity of the SCM. Combining the power of the Parliament to appoint the Council's members with a strong political majority supporting the Government, it resulted that the political power had total control over the SCM and indirectly over the judges and prosecutors. The SCM was characterized as "an inoffensive institution, without a great impact on the judicial system".[31]

The amended constitution significantly enhanced the powers of the SCM, making it an autonomous institution, especially as regards decisions on the careers of magistrates. The power to propose to the President of Romania the appointment of judges and prosecutors was maintained. The second role of the Council, a disciplinary court for magistrates, was consolidated, while the powers of the minister of justice were removed: thus, the Constitution provides that the Council "shall perform the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and prosecutors, based on the procedures set up by its organic law. In such cases, the minister of Justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Public Prosecutor's Office attached to the HCCJ shall not be entitled to vote" (Article 134 (2)CR). The decisions adopted by the Council, when acting as a disciplinary court, may be challenged at the High Court of Cassation and Justice, as established by Article 134 (3) CR. According to Article 133 (7), all other decisions of the Council are final. Another guarantee for independence in decision-making is the new Article 134 (5), according to which all decisions of the Council are taken by secret vote.

During the transitional period until the enactment of the new LSCM, the Ministry of Justice together with the members of the SCM started to transfer the decision-making from the

[30] *See* also Ion Popa, CONSILIUL SUPERIOR AL MAGISTRATURII DIN ROMÂNIA – DE LA SUCCES INSTITUȚIONAL LA EȘEC FUNCȚIONAL (2011) 18–19. The author characterizes the period as a 'dictatorship' of the Ministry of Justice on the SCM.

[31] Bogdan Dima, Elena Simina Tănăsescu, REFORMA CONSTITUȚIONALĂ: ANALIZĂ ȘI PROIECȚII (2012) 139.

minister of justice to the Council. The minister of justice gradually withdrew from the process of appointing magistrates.[32] Within 90 days from the enactment of the new law, a new Council was elected, which started to function in January 2005. Even in the new formula, the Ministry of Justice retained the decision-making power on budgetary and financial issues related to the judiciary.

The current constitutional text leaves open-ended the list of the Council's powers: the organic law may bring additional powers, if necessary for the Council's role of 'guarantor of the independence of justice' (Article 134 (4) CR). The SCM has the right to address the Constitutional Court with a request 'to solve legal conflicts of a constitutional nature between public authorities' (Article 146 (e)CR). Other important powers of the Council are to: decide on secondment and delegation of judges and prosecutors; appoint leadership positions of courts and prosecutors' offices; solve complaints regarding the annual evaluations of judges and prosecutors; solve complaints regarding the inadequate behaviour of judges and prosecutors; advise on the proposal of appointment of the general prosecutor of the Prosecutor's Office attached to the HCCJ, of the chief-prosecutor of the DNA, of the chief-prosecutor of the Directorate for Investigating Organized Crime and Terrorism and of their deputies; decide on the suspension from office of judges and prosecutors. As regards the management of courts and prosecutors' offices, the SCM approves the creation and closure of courts' sections and of prosecutors' offices' sections and decides on which cases or actions shall be decided only in Bucharest and only by certain courts, according to the law. The SCM sections (for judges and prosecutors respectively) also have the power to decide on measures restricting the personal freedom of judges accused of criminal offences, such as searches and preventive detention measures.

In relationship to the legislative power, the SCM Plenum[33] can give advisory opinions on draft laws regarding the activity of the judicial authority, upon request by the initiators. Although the object of these opinions seems limited to the draft laws on the organization of the judiciary and the status of magistrates, this power has been extended de facto to other laws, such as the criminal code or the code of criminal procedure. The Constitutional Court, in a case law started in 2009,[34] tried to restrict this competence of the Council by stating that the wording "draft laws regarding the activity of the judicial authority" only refers to the laws that apply directly to the organization and functioning of the judicial authority and that "any other interpretation given to this wording would determine an extension of the SCM's powers that would not be grounded on clear and predictable

[32] *Ibid*. at 23.

[33] Article 38 (4) LSCM.

[34] RCC, Decision 901/2009, Decision 3/2014.

criteria and therefore be arbitrary".[35] Nevertheless, in the absence of clear legal dispositions, various ministries continued to request advisory opinions from the Council on other draft laws. One of the most famous cases is that of Emergency Ordinance no. 13/2017, which tried to restrict the application of the Criminal Code provisions on the offence of "abuse of office" (and thus generated ample street protests in February 2017)[36]. In this case, the Ministry of Justice initially sought the advisory opinion of the SCM, but afterwards, without waiting for the Council's answer, forced the adoption of the Ordinance in an unannounced Government meeting organized the same night. The president of the SCM and the President of Romania then addressed the Constitutional Court with a request to resolve a constitutional conflict between authorities, but the Court rejected the complaint and declared that there was no such conflict because the Government "had no legal obligation to seek the SCM's advisory opinion" on said Ordinance.[37]

II. Role of the SCM within the Judiciary

The SCM has extensive powers as regards the recruitment and disciplinary investigation of magistrates through two structures that it coordinates: National Institute of Magistracy and Judicial Inspection.

The National Institute of Magistracy (hereinafter NIM) is the sole structure for recruiting and training new magistrates (trainee judges and prosecutors). It was created in 1997 under the subordination of the Ministry of Justice and has been placed, since 2004,[38] under the coordination of the SCM. The NIM has the role of assuring "the initial training of judges and prosecutors, continuous training of acting magistrates as well as of training of trainers". Unlike the initial regulation, under which the NIM was "subordinated" to the Ministry of Justice, it is now "coordinated" by the SCM. The NIM is led by a Director and a Scientific Board that includes representatives of the HCCJ (Court and Prosecution Office), of the Bucharest Court of Appeal, academics from three universities, three representatives of the training staff of the NIM and one representative of the trainees.

The NIM recruits new judges and prosecutors from among law graduates, through a national exam organized in Bucharest. Once admitted to the NIM, the law graduates become "auditors of justice", i.e. trainee judges and prosecutors, for two years. After that, they can become judges or prosecutors at lower courts.

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[35] RCC, Decision 3/2014.

[36] *See*, for details, Bianca Selejan-Guțan, *We Don't Need No Constitution'–On a Sad EU Membership Anniversary in Romania,* Verfassungsblog, 1 February 2017, http://verfassungsblog.de/wedontneednoconstitutiononasadeumembershipanniversaryinromania/.

[37] RCC, Decision 63/2017.

[38] Law no. 304/2004 on Judicial Organisation.

The Judicial Inspection (hereinafter JI) is an internal structure of the Council, having its own legal personality. It is run by a chief-inspector appointed via competition organized by the SCM. According to LSCM,[39] the JI is guided by "operational independence" and composed of judicial inspectors, i.e. judges or prosecutors seconded as such. As its powers were consolidated in 2012,[40] the JI is now entitled to pursue disciplinary actions against magistrates. The JI can act *sua sponte* or based on a complaint filed by the minister of justice, by the president of the HCCJ or by the general prosecutor attached to the HCCJ, as well as by any person proving an interest and by the SCM itself, as regards disciplinary offences allegedly perpetrated by judges and prosecutors. Members of the SCM can also be investigated by the JI. The disciplinary actions investigated by the JI are decided by the respective sections of the SCM (judges or prosecutors).

Upon registration of judicial complaints, judicial inspectors can verify court compliance with procedural norms regarding random case assignments, delays, continuity of judicial panels, elaboration and communication of decisions, etc. The JI has extensive powers as regards the verification of the "managerial efficiency" of the leadership of courts and prosecutors' offices, as well as the complaints against the "inadequate behaviour" of judges and prosecutors or the breach of their professional duties. An interesting competency is the one of verifying the individual requests to "defend the good reputation" of judges and prosecutors, addressed to the SCM by the incumbent persons.

Besides recruitment and disciplinary actions, the SCM has an important voice in appointing all court presidents except for the President of the High Court of Cassation and Justice.[41] They are appointed following a competition organized by the SCM through the National Institute of Magistracy. Court presidents, elected for a three-year term of office, once renewable, have mainly court administration competencies. Their powers are curtailed by the existence of a Ruling Board, which has most decision-making powers.[42] Thus, court presidents are designed more as managers or administrators of the courts rather than

[39] Article 65(2).

[40] By the changes made by the Law no. 24/2012 to the Law no. 317/2004 on the SCM.

[41] The 2018 amendments of the law on the organisation of the judiciary (entered into force on 23 July 2018) gave the Council the sole power of appointing the President and Vice-presidents of the HCCJ, by removing the competence of the President of Romania of appointing the chief justices. In the former regulation, the president of the HCCJ, as well as the vicepresident and the section presidents, were appointed by the President of Romania, at the proposal of the SCM, from among the high court's judges with a minimum of 2 years seniority in office. The actual management of the HCCJ is done by a Ruling Board that includes the president, vicepresident and 9 judges, elected by the general assembly of judges for a period of 3 years.

[42] For example, the Ruling Board of the High Court of Cassation and Justice has the following powers: approves the Rules of Court and the staff roll of the Court; analyses the candidacies for the position of judge at the HCCJ and reports on them to the SCM; proposes the draft budget of the Court, etc.

actual leaders. They supervise the system of random case assignment[43] and have limited competence in the professional assessment of judges: the evaluation process is actually led by a committee approved by the SCM, composed of the president of the court and of two other judges appointed by the Ruling Board. This might be the most important power the court presidents have over their peer judges, as the periodical evaluation can influence a judge's career and promotion.

From a more informal standpoint, it must be mentioned that there are several associations established as private organizations – the Romanian Association of Magistrates, the Forum of Judges and the National Union of Judges. They have no formal role in court administration or the judicial careers. These associations can bring complaints to the SCM regarding alleged abuses against the individual rights of magistrates or abuses against the independence of justice.

To conclude, since 2004, de jure and de facto, the SCM has been a classic illustration of the "external incentives (accession conditionality) theory"[44] on judicial councils, in the context of the pre-accession to the European Union, and has gradually gained the position of the most powerful actor regarding court administration and the careers of magistrates in Romania. This position is consolidated by the control that the Council itself has on all actions related to magistrate careers (appointment, promotion, dismissal, retirement) at all levels, as well as on all disciplinary actions initiated by the Judicial Inspection and on recruiting new magistrates through the National Institute of Magistracy. These extensive powers have increased the authority of the Council within the judiciary and the autonomy of the judiciary from the other public powers, but they have also generated problems and perils to the system. In the following sections, I will try to assess the existence and the potential consequences of these perils, as well as to discuss whether a too autonomous SCM could itself become a peril to the constitutional system.

C. Who Threatens the Judicial Self-Government?

The main external perils regarding the Romanian judiciary come from the political sphere: political pressures have been the most likely to affect judicial independence. The process of creating an autonomous system, through a powerful SCM has been seen as a potential progress and solution, but it has created other problems and internal perils in return.

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[43] Established in 2005.

[44] *See* Kosař, *supra* note 19 at 11.

I. External Perils – the Struggle for Independence

Judicial independence is one of the fundamental principles of the Romanian constitutional system. It is included in the wider concept of rule of law and is protected by strong constitutional guarantees. Although the Constitution does not define judicial independence, it is mentioned, as an objective value, in Article 152 (1) and as a subjective value – or the "independence of the judge" – in Article 124 (3): "judges are independent and subjected only to the law". This subjective independence of individual judges has its own constitutional safeguards, among which the most important is irremovability, guaranteed by Article 125 (1)CR. The most important formal constitutional protection of judicial independence as an objective value is its recognition as an 'eternity clause' by Article 152 (1) CR.[45] Other guarantees established by the Constitution and by the Law on the Status of Magistrates are the publicity of the proceedings, the obligation to reason the decisions, etc.

The de jure independence of the judiciary formally increased since the reform of 2003-04. This independence is also protected by, besides the general insulation of the system as regards access, selection, appointments, career and accountability, the possibility of the SCM, through the Judicial Inspection, to issue reports on the "defence of reputation, independence and impartiality" of the judiciary as a whole and of individual judges or prosecutors. Such reports have been made regarding various public statements by politicians or by media representatives, deemed harmful to the independence of the judiciary. For example, in December 2016, the SCM Plenum found against statements made by a former President of Romania on a TV show; he had launched "serious accusations about the independence and impartiality of prosecutors, claiming that they are run by external forces, that they protect the interests of these foreign forces in exchange for some decorations and appreciations, by acting against the Romanian values". The Plenum found that these accusations were prone to have "a negative impact on the credibility of the judicial system, having as a consequence the affectation of the independence and impartiality of magistrates".[46] Prior to the decision, the judicial inspectors involved in the case found that these statements by the former President of Romania, a public figure who enjoys notoriety, represented "a deformation of factual reality, capable of inducing the idea of an abnormal functioning of the judiciary as a whole".

Similar reports were made by the SCM Plenum on various statements of the acting President of the Senate in which he claimed that the DNA was aiming to eliminate

[45] Article 152 (1) reads as follows: "The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision."

[46] http://old.csm1909.ro/csm/linkuri/16_12_2016__85230_ro.htm

politicians from the electoral competition by accusing them of corruption.[47] These statements were included in a document – *Appeal to the parliamentarians/Apel către parlamentari* – that was published on the official website of the Senate, a situation that was considered by the SCM as "creating the impression of subordination between the state powers, infringing the constitutional principle of separation of powers, having as a consequence the undermining of the credibility and prestige of the judiciary and, indirectly, of the independence and reputation of magistrates". These actions of "defending judicial independence" influence de facto independence, i.e. may reinforce the resistance of judges against potential external pressures and attempts of intimidation.

The current normative framework regarding the guarantees of de jure independence of the judiciary is quite extensive and seems to have good support in practice. Threats to the de facto independence still exist, generated more by political or media pressures, but also by attempted legislative changes.

The degree of de facto independence is more difficult to assess because it is based more on perceptions and factual evidence that is not always available to the public, due to the low levels of transparency within the system. For example, there are no statistics regarding the number of actions against magistrates specifically for lack of independence. The public perception of the judiciary is a good marker, but not the only one. Even more difficult to assess are, on the one hand, the independence of the SCM itself from any type of influence (from the political sphere or the media) and, on the other hand, the independence of judges and/or prosecutors from internal influence (court presidents/chief-prosecutors, judicial inspectors, members of the SCM, etc.). Obviously there may be cases of external interference with formal independence, and there have been, in the last decade, some cases of corruption of judges (bribery, tampering with evidence, interference with the random distribution of cases, etc.) or of a lack of impartiality that affected the de facto independence.

Among the problems the European Commission considered that might have affected the de facto judicial independence in Romania was, at the outset of the CVM in 2007, the secondment of judges to other positions, usually within the executive (e.g. Ministry of Justice), with the right to retain the initial position. This phenomenon decreased due to the involvement of the SCM, as the Commission found in its first CVM report of 2007: "the SCM is becoming stricter in granting secondments to magistrates". The Commission also found that the possibility of other authorities to change the personnel scheme of the judiciary and thus affect the de facto independence is significantly reduced due to the SCM.

[47] http://old.csm1909.ro/csm/linkuri/15_11_2016__84154_ro.htm

Output independence is the most difficult to assess due to a lack of consensus stemming from the subjective perceptions of the parties involved. During the transition period (1992-2000), the output independence of the judiciary as a whole and of individual judges was seriously affected by the political factor. The judiciary of the time was inherited from the communist regime. Therefore, at the beginning of the transition period, especially superior courts had a certain tendency to follow political directives given from "above". The case of the nationalized buildings, claimed by the former owners in the period 1990-1995, is famous. After a ground-breaking jurisprudence based on the Civil Code, in favour of the former owners (1992-1993), the Supreme Court suddenly changed its mind in 1995 and stated that property "could only be acquired by way of legislation, (…) that the State had taken the house on the very day on which the nationalization Decree had come into force and that the manner in which that decree had been applied was not to be reviewed by the courts."[48] This jurisprudential U-turn was the result of a speech indirectly addressed to courts by the former President of Romania, Ion Iliescu, in 1994: "all judgments adopted by courts do not have a legal basis to decide the restitution of property, as long as a law does not say in what context and how such a restitution can be done to a nationalized owner."[49] This was one of the earliest cases in the post-communist history of Romania when the political factor decisively influenced the outcome of hundreds of judicial decisions: all previous decisions of lower courts in favour of former owners were quashed by the Supreme Court via an extraordinary appeal – *recurs in anulare* – that could only be introduced by the General Prosecutor without any time-restriction and with retroactive effect on final judgments.[50] This appeal was removed from the legislation in 2006 following a massive number of ECtHR judgments that found violations of Article 6 of the ECHR.[51]

More recently, the political factor lost momentum in influencing the judiciary, but this became a problem for the independence of individual judges. The loss of direct influence generated other kinds of pressures from the political side, with anti-corruption policies playing a significant part. Thus, direct or indirect pressures on individual judges manifested especially in major corruption cases or in cases with an important financial stake and these pressures took the form of media exposure regarding judges' personal lives, media assertions regarding prosecutors or judges and their alleged lack of independence, threats of filing complaints with the Judicial Inspection, etc. These were doubled by statements affecting judicial independence as a whole (see above) made by politicians, media influencers, media patrons, etc. (usually convicted or investigated for corruption crimes) and even by attempts to change the legislation so as to remove certain corruption offences

[48] Selejan-Guțan, *supra* note 13 at 293.

[49] *Ibid*. at 294.

[50] *See* also Părău, *supra* note 4 at 657–58.

[51] Brumărescu v. Romania, App. No. 28342/95 (28 October 1999) and the subsequent case law.

or diminish their scope.[52] The European Commission noted in its CVM report of 2013 that "unfortunately (…) politically motivated attacks on the judiciary have not ended. A critical point is the acceptance of judicial decisions: this requires the whole of the political class to form a consensus to refrain from discrediting judicial decisions, undermining the credibility of magistrates or putting pressure on them".[53] As the situation escalated, the European Commission took a stance by saying that certain media pressures may become a "threat to the independence of the judiciary; same goes for the relative incapacity of the National Audio-visual Council to sanction those situations." [54]

The 2013 CVM report emphasized the progress in the anti-corruption track-record, especially related to the de facto judicial independence: "the commitment of the executive and legislative to the quality of appointments to key posts in judicial institutions",[55] i.e. ensuring the appointment of a leadership – especially of the DNA - that can prove integrity, independence and professionalism. Along this line, in 2014, the Commission asked for more transparency in the appointment procedure of senior prosecutors. The independence of the judiciary has thus been seen by the Commission as not only regarding the independence of judges, but also of prosecutorial activity, especially anti-corruption activities.

Another threat to judicial independence from the political side is the hindering of criminal investigations, especially for corruption offences, regarding parliamentarians or members of Government. The Chambers of Parliament rejected numerous requests from the DNA and from the General Prosecutor's Office to investigate members or former members of Government (who are also parliamentarians). As the Constitution requires parliamentary approval in such cases, the European Commission criticized this practice in its CVM reports. Despite the EU's insistence, the practice of rejecting investigation requests still occurs.

In 2012, a new disciplinary offence was introduced in the Law on the Status of Magistrates: the non-observance of the decisions of the Constitutional Court or of the decisions of the HCCJ pronounced in an appeal on points of law. Although it has never been applied,[56] this sanction can be problematic, as the Constitutional Court is a political-legal institution and its decisions can have a politically influenced background. Thus, the possibility of a disciplinary motion against a judge who expresses an opinion contrary to a political stance of the Constitutional Court may be an indirect form of political pressure on individual judges.

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[52] For a detailed account on "Black Tuesday" (2013), see Selejan-Guțan, *supra* note 7 at 86.

[53] COM(2013) final at 4.

[54] *Ibid*.

[55] COM (2013)47 final at 4. See, for details, the 2017 Technical report SWD(2017) 25 final at 1314.

[56] Two disciplinary cases based on this text were referred to the SCM in 2017 and are still pending.

An important external peril, especially present in the last few years, is the pressure exercised by political powers through changes to the judiciary legislation. After the major reform of 2003-2004 and a period of relative legislative stability, in 2017, under the PSD government installed after the December 2016 elections, new major changes of judiciary legislation were envisaged. The first proposals were presented by the minister of justice in August 2017 and were debated and amended in Parliament, in a controversial emergency procedure, in December 2017. The changes were directed towards all three "judiciary laws": the Law on Judicial Organization, the Law on the Status of Magistrates and the LSCM, and they refer to magistrates' careers. The changes introduce new disciplinary offences and include harsher positions on magistrates' accountability.[57]

The changes and their hasty adoption generated a strong reaction from the civil society, political parties and associations of magistrates,[58] alongside other actors, both internal and external. The President of Romania, the European Commission and embassies of the US and of several EU member states expressed their concern about the way in which the proposals may affect the independence of justice and the rule of law in Romania.[59] The SCM itself gave negative advisory opinions on both versions (initiative and draft law). The main criticisms and concerns regard the creation of a new prosecutorial section specialized in investigating magistrates,[60] seen as a form of discrimination against judges and prosecutors, as representatives of other state powers are investigated by ordinary prosecutorial offices or the DNA, depending on the accusations. There were other, indirect forms of pressure against judicial independence as well, such as the introduction of an obligation for judges and prosecutors to "abstain from any defamatory expression against the other state powers – legislative and executive". This requirement was seen as a potential tool that would force judges to adopt certain views in particular cases.

It is also striking that, while diminishing the powers of the President of Romania – by removing the right to appoint the president of the HCCJ and by limiting the right to refuse

[57] The amendments of the law on the status of magistrates were challenged several times at the Constitutional Court before promulgation. The Court gave its first decisions in January 2018. As a result, all drafts were declared partially unconstitutional and reexamined by Parliament. Currently (July 2018), the readopted versions are in the process of promulgation and were referred again to the Constitutional Court.

[58] One of the judges' associations registered an *amicus curiae* statement at the Constitutional Court, where numerous breaches of the Constitution are emphasized. See Forumul Judecatorilor, *Memoriu amicus curiae pentru Curtea Constitutionala a Romaniei,* http://www.forumuljudecatorilor.ro/wpcontent/uploads/Amicuscuria eCCRlegilejustitiei.pdf

[59] *See*, for details, Bianca Selejan–Guțan, *Failing to Struggle or Struggling to Fail? On the New Judiciary Legislation Changes in Romania,* Verfassungsblog, 31 January 2018, https://verfassungsblog.de/failingtostruggleorstruggling tofailonthe newjudiciarylegislationchangesinromania/

[60] SCM, Decision no. 1148/9 November 2017.

the appointment of the senior prosecutors – the amendments increased the powers of the SCM, which would be the sole actor deciding on the appointment of the HCCJ chiefs and the final advisor on the appointment of senior prosecutors.

An interesting dimension of external perils concerns the "social" legitimacy of the SCM (i.e. the legitimacy of the SCM vis-à-vis the people and the representative political authorities). The social dimension of legitimacy is closely related to public confidence in the judiciary, but they do not overlap. Social legitimacy includes acceptance by other authorities, acceptance by politicians individually and acceptance by the public. The public authorities rarely called into question or blatantly disregarded the judiciary as a whole or particular judicial decisions. The few existing conflicts had a special importance in the context of the principle of "loyal cooperation"[61]: they were "legal conflicts of a constitutional nature" between authorities, as defined by the Constitutional Court. One of the most famous conflicts took place in 2012 between the judiciary (the HCCJ) and the Senate, which refused to apply a final decision of the former regarding the incompatibility of a senator. The Constitutional Court was addressed by the SCM with a request to solve a constitutional conflict and ruled, *inter alia,* that:

"The negative vote [of the Senate] as regards the incompatibility that was established irrevocably by a judicial decision, the Senate acted *ultra vires*, arrogating competences that belong to the judicial power. Consequently, the Court notes the existence of a legal conflict of a constitutional nature between the judiciary and the legislative authority, represented by the Romanian Senate, which could obstruct the judiciary in its constitutional powers vested in it. Therefore (...) the Senate has the obligation to take into account the incompatibility as stated by the [judicial decisions at stake] and to decide the *de iure* cessation of the senatorial mandate of Mr. M.D., according to the Law on the statute of deputies and senators"[62]

Another way of disregarding the SCM's legitimacy was the failure of the Government or ministries to request the Council's opinion on laws regarding the judiciary. This has been the object of several constitutional conflict complaints addressed to the Constitutional Court. For example, a request from 2009 stated that, "in the period 2005-2009, the Government initiated and approved 77 normative acts regarding the activity of the judiciary, without asking the opinion of the SCM", although there are legislative dispositions that set this obligation. The Constitutional Court rejected the claim[63] on the grounds that these aspects do not qualify as a "legal conflict of a constitutional nature" between authorities.

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[61] A loose interpretation of the Romanian Constitutional Court, i.e. a principle that could cover and define separation of powers more broadly.

[62] RCC, Decision no. 972/2012.

[63] RCC, Decision 901/2009.

Individual politicians may also not easily accept the limited possibility to interfere with justice, but this might also be a strong factor of increasing public confidence in the judiciary. There were many cases of political leaders or former ministers, convicted by final judgments for corruption offences, who kept criticizing the judicial decisions given against them (especially as regards the objectivity and impartiality of the courts) or against other politicians. Some of these statements, made in the public space (TV, social media) were examined by the Judicial Inspection and the SCM and amounted to "interferences with the independence of the judiciary" or statements that affect the judicial independence and image. The attempts of politicians to undermine the authority of the judiciary can be considered among the main factors with the highest *negative* influence on judicial legitimacy.

The SCM reacted against various external pressures and attempts at undermining judicial independence through different means: in 2016, it took 40 decisions "defending" the independence of the judiciary and the independence and professional reputation of individual judges. In the same year, the SCM signed a protocol with the National Union of Romanian Bar Associations by which magistrates were given the right to free legal assistance in cases brought to court to seek redress for actions against their professional reputation. The indirect pressures continued, however. In its 2017 CVM Technical Report, the European Commission noted that, besides the SCM, "it is notably rare that any State authority, politician or media publicly condemns such criticism of the judicial system, or individual magistrates on grounds that it harms the independence of judiciary, even once established that the claim is untrue".[64]

As for the external pressures from the EU authorities, they proved to be a positive factor, either through the CVM reports or through other formal and informal means. Although this has been recently challenged by some authors,[65] in my view, without the external supervision, the high level of political corruption in Romania would have been a major obstacle to judicial de facto independence and reinforcement of judicial legitimacy.

II. Internal Perils – the Quest for Accountability and Legitimacy

Perils coming from within the judiciary affect especially its accountability and legitimacy. Such perils may be, on the one hand, the gap between strong independence and weak accountability and, on the other hand, internal conflicts that challenge the system's legitimacy. Nevertheless, in the absence of clarity and predictability of its rules, accountability can become a threat to judicial independence.

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[64] SWD(2017) 25 final at 12.

[65] *See*, for details, Iancu, *supra* note 3 at 584585.

Judicial accountability is one of the most sensitive issues in all judicial systems, but especially in the post-communist countries, where the communist regime took its toll and the judiciary was, for a long time, accountable only to the political power. The need for changes in legislation and mentality, advocated after 1990 in the constitutional and legal orders of these countries, was long rejected, silently but resolutely, by the old-school judiciaries. As I pointed out elsewhere,

"If the legislature and the executive were forced to change in a drastic and spectacular way by the process of popular elections and by media scrutiny, the judiciary maintained the rules and privileges of the 'judicial cast' until almost present days. Early changes in the laws of judicial organization were little and timid. Even the successive re-modellings made in order to comply with EU requirements were not able to solve the structural problem of the Romanian judiciary: incapacity to adapt to the new realities."[66]

This is especially true as regards judges, because the means of engaging their accountability were few and weak. Nevertheless, the willingness to join the European organizations influenced the acknowledgement of judicial accountability as an element of the rule of law, which was a constant requirement of these organizations for the new members. After 2004 and especially after the establishment of the CVM in 2007, the SCM was forced to take steps to increase the degree of accountability, especially of disciplinary accountability.

The disciplinary offences for which magistrates can be held accountable are currently listed by the Law on the Status of Magistrates.[67] There are over 20 kinds of offences, from actions that affect the honour and professional reputation or the prestige of the judiciary, to political activities or public manifestations of political convictions, from the unjustified refusal to perform a duty, to the interference with the activity of other judges and/or prosecutors or to the exercise in bad faith or serious negligence of duties. The law also lists the disciplinary sanctions that can be applied by the SCM. In practice, there is quite an extensive case law of the SCM sections regarding disciplinary action. Among the sanctions applied in the last four years were: warning, suspension from office for 3 to 6 months, salary reduction, disciplinary transfer, and exclusion from magistracy.

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[66] Selejan-Guțan, *supra* note 13 at 289.

[67] Law no. 303/2004.

Figure 2. Disciplinary actions against judges

Figure 3. Disciplinary actions against prosecutors[68]

Disciplinary accountability is not the only form of accountability for magistrates: civil and criminal accountability can also apply. For example, the Law on the Status of Magistrates and the Code of Criminal Procedure provide the right of the State to file civil actions against the magistrates responsible for judicial errors and unfair convictions. Article 96 of the Law on the Status of Magistrates provides that "(1) the State is materially accountable for any damages caused by judicial errors. (2) The State's responsibility does not exclude the responsibility of judges and prosecutors who exercised their functions with bad faith or gross negligence". After the first version was declared unconstitutional, the draft amendments adopted in 2018 define more precisely the notions of "judicial error" and "gross negligence". So far, there are no available statistics regarding the number of cases in

[68] Source: SCM Reports on 2014 and 2015, http://old.csm1909.ro/csm/index.php?cmd=24; Reports of the Judicial Inspection on 2016 and 2017, http://old.csm1909.ro/csm/linkuri/09_03_2017__86944_ro.pdf and http://old.csm1909.ro/csm/linkuri/07_03_2018__90791_ro.pdf.

which the State has filed complaints against judges or prosecutors for damages paid as a result of such judicial errors.

Judges and prosecutors may also be subject to criminal investigations, but they can only be searched or arrested with the consent of the corresponding sections of the SCM. In case of flagrant offence, the magistrates can be retained and searched, but the SCM must be immediately informed of the situation. In recent years, there were several cases of criminal investigation and conviction of magistrates in criminal cases, mostly regarding corruption offences such as bribery or influence trafficking. In 2014, a law came into force that limited the special pensions for magistrates convicted of corruption.

The gap between independence and the de facto accountability of magistrates has been a recurrent issue in the Romanian judicial system and public debate. Although the law is generous in strongly guaranteeing independence and in regulating various forms of legal accountability, the cases in which these rules apply are relatively few. In its 2011 CVM Report, the European Commission noted:

"Improving the accountability *of the judiciary* remains an important challenge. Since the Commission's last annual assessment, new recruitment rules for judicial inspectors were adopted and some steps were taken to improve the efficiency and transparency of the Judicial Inspection and to unify its practice. The capacity and track record of the Inspection has not significantly improved. The analysis of a sample of high-level corruption cases which remain delayed in court by the Inspection has not led to any significant findings or recommendations regarding judicial practice. Romania has not yet engaged in a thorough reform of the disciplinary system."[69]

The situation has not improved much since 2012, when the annual report noted that, despite the strengthening of the legislation on the disciplinary responsibility of the judiciary, little has changed at the de facto level.[70]

In 2016, the Commission renewed the recommendation to the new SCM to "take clear measures for increased transparency and accountability";[71] it was a sign that the situation was still far from being resolved, although the Commission noted that "increased steps" had been made in this direction. The 2017 Technical report,[72] released 10 years after the

[69] COM(2011)460 final at 5.

[70] COM (2012)56 final at 3.

[71] CVM Progress Report, January 2016: https://ec.europa.eu/transparency/regdoc/?fuseaction=list&n=10&adv=0&coteId=1&year=2016&number=41&version=F&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC.

[72] SWD(2017)25 final at 910.

accession, pointed out an increase of corruption investigations against magistrates. This was "attributed to an increase in whistle-blowing" and not to a structural improvement of the formal integrity system. The report also praised the fact that the SCM had authorized all requests for the search and arrest of magistrates since 2007, and that it had regularly decided on the suspension of magistrates under criminal investigation. Although the 2017 report stresses that the progress in increasing the actual cases of accountability was slow, it also highlighted that, when the SCM decisions in disciplinary cases were appealed before the HCCJ, there were little variations in the recent years between the SCM and HCCJ decisions.

There is little public information regarding informal accountability, which may manifest itself in alternative types of "penalties" such as retirement requests, requests to leave magistracy, voluntary transfers to other courts, etc. An interesting case of "informal accountability" that ended up with a formal accountability decision was the one of a judge excluded from magistracy for lack of impartiality. The judge in question had participated, as a trainer, in training sessions organized by a Ministry of Agriculture Agency, for which she was remunerated. The National Agency for Integrity, at the request of the judge, had said that there was no formal incompatibility between the position of trainer and that of a judge. However, according to a previous decision of the SCM, judges can act as experts or trainers only in judicial training programs, whereas the training in question targeted experts in agriculture. Later on, the incumbent judge was a part of the panel that ruled in favour of the Ministry of Agriculture in a case. The SCM found that "as a consequence of the defendant's acts, the image of the judiciary was seriously affected as the regulation of the conflict of interests has a double purpose – the defence of the prestige of the judiciary and the prevention of situations that could cast a doubt on the public perception of the magistrate's impartiality".[73] Therefore, the seriousness of the offence determined the application of the most serious penalty – removal from magistracy. The judge filed an appeal at the HCCJ, which, in December 2017, removed the sanction and replaced it with a disciplinary reassignment to a judgeship at a Court of Appeal.[74]

There have been several proposals to introduce a special law on the accountability of magistrates, but this has never been formally initiated. Because the idea for such a legislative initiative has been used as a form of pressure on the judiciary by various political actors (the latest one being the PSD minister of justice in January 2017), the SCM as well as the representatives of magistrates in other organizations (such as the Union of Romanian Judges) advised against such a project.[75]

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[73] SCM, Decision 1/J of February 2017. In April 2018, the same judge was excluded once again from magistracy, for a different offence.

[74] http://www.scj.ro/1094/Detaliidosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000309773.

[75] http://www.digi24.ro/stiri/actualitate/csmlegearaspunderiimagistratilornuesteoportuna648378.

The 2017-18 amendments of the Law on Judicial Organization[76] include some highly contested provisions regarding the accountability of magistrates, including the creation of a special section within the General Prosecutor's Office, specialized in investigating "criminal offences within the judiciary". Although this was strongly opposed by the associations of judges and seen by the SCM[77] as unnecessary and an indirect threat to judicial independence, the Constitutional Court, in its decision on the amended law before promulgation, stated that the creation of the new section is within the constitutional competence of the Parliament to legislate and therefore is not unconstitutional.[78]

In the context of accountability and legitimacy, a special reference must be made to the accountability of the SCM itself, which has been called "a chimera" by some authors.[79] The increase in SCM autonomy and powers in 2003-2004 meant that its own accountability to external authorities decreased exponentially. The only political authority still involved in the formation of the Council is the Senate, who appoints the two representatives of the civil society. The Senate also validates the election procedure of the SCM, but this is more of a formal power of the second chamber of Parliament, as any censorship can be imposed only regarding matters of legality. A higher degree of accountability usually increases the legitimacy of any public power. Therefore, the SCM's almost entire lack of accountability can call into question its legitimacy: "The fact that the overwhelming majority of the SCM members are elected by and from their peers and further officially validated (…) by the Senate causes that any connection between them and the citizens is broken".[80]

The legal dimension of legitimacy (i.e. the legitimacy of the SCM within the judiciary) is straightforward, as the Constitution and LSCM provide strict rules for the composition and election of the SCM. Respect for the rules of election has not been called into question thus far, but the election of the SCM members by their peers is not followed by any possibility of recalling them. The revocation from within of the de jure members of the SCM is virtually impossible, as their membership is due to their offices (president of the HCCJ, minister of justice, etc.).

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[76] The Law was challenged at the Constitutional Court before promulgation, declared partly unconstitutional, was reexamined by the Parliament in March 2018 and is now pending promulgation.

[77] SCM, *supra* note 56 at 12. In March 2018, the Council of Europe's Group of States against Corruption adopted a Report which recommended the removal of this special section from the draft legislation. See GrecoAdHocRep(2018)2 at 17.

[78] RCC, Decision 33/2018. The new provisions are likely to enter into force later in 2018.

[79] Tănăsescu & Popescu, *supra* note 2 at 171.

[80] *Ibid*. at 172.

In this context, the latent internal battle between judges and prosecutors or other internal conflicts may become challenges in themselves to judicial legitimacy. A famous conflict arose in 2013 after the election of a prosecutor as the SCM president. The judges protested and claimed that a prosecutor should never occupy this position.[81] As a result, a "turf war" started and two judges, members of the SCM – one of whom had been elected vice-president – were removed from the Council by the Plenum. This was possible only following the vote of the general assemblies of judges all over the country.[82] One month later, the Constitutional Court[83] declared that the legal texts setting the rules of removal were unconstitutional because they were unclear and infringed on the right to defence. As a result, the two members were reinstated.[84]

As for the latest elections of 2016, it must be noted that, although the elections of the magistrate-members were finalized in 2016, the Senate elected the representatives of the civil society only in September 2017. This was due to political battles within the parliamentary committee that had to advise the appointments. Therefore, instead of being actual representatives of the civil society, these members are appointed according to various political interests, which is a distortion of their actual role within the Council of being impartial members from outside of the judiciary.

To conclude, the SCM generally enhanced the idea of accountability and legitimacy within the system. Internal conflicts and a certain resistance to stronger rules on accountability remained, however, as perils to a more balanced relationship between independence and accountability.

D. Who's Afraid of Judicial Self-Government?

In spite of, or perhaps due to, its increased autonomy, judicial self-government may be perceived as a threat by a part of the civil society, as well as by other state powers, in the context of the variable public confidence in the judiciary and of the position of the judiciary within the separation of powers equation.

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[81] http://stiri.tvr.ro/disputeledincsmconflictintrejudecatorisiprocurorialegerinetransparente_25751.html. *See* also Selejan-Guțan, *supra* note 7 at 195-96.

[82] http://www.hotnews.ro/stiriesential14305057decisivacsmalegereavicepresedinteluirevocareajudecatorilorcristidaniletalinaghicaordineaplenului.html

[83] RCC, Decision 196/2013.

[84] *See* also Iancu, *supra* note 28 at 192.

I. In Judges We Trust: Transparency and Public Confidence

Transparency and public confidence are strongly related: the degree of transparency is among the factors that affect the degree of public confidence in the judiciary. In the last decade, transparency in the judicial system has increased mainly at the level of outcomes (judicial decisions). There is also more public information on judges and prosecutors, especially as regards wealth statements and interest statements, which are now published on the SCM's website. This also improved the findability of information, as the new platform is easy to use. There is no detailed information about the magistrates' CVs or careers, only the list of all judges from each Court of Appeal's territorial jurisdiction. The transparency within the SCM was improved by the publication of the Council's decisions, but the hearings and deliberations are still closed to the public, so there is little transparency about how the Council comes to its decisions. As a notable recent exception, due to the high public and media interest in the matter, the SCM decided to provide a live broadcast of the hearing, by the Section for prosecutors, of the chief-prosecutor of the DNA in the case of her proposed dismissal by the Minister of Justice, on 27 February 2018.

In the communist period, one of the factors that negatively influenced the level of public confidence in the judiciary was the political influence of the ruling party, especially as regards the prosecuting offices (*procuratura*). In the post-communist period, especially during the transition years, the constitutional entrenchment of the independence of the judiciary was not sufficient by itself to establish a higher level of public confidence. Romania did not enact lustration legislation, therefore all judges from the communist regime maintained their positions, regardless of their background. That is why the level of public confidence in the judiciary was not particularly high in the first decade of the transition.

The situation changed with the reform of the SCM, which at first served as a strong incentive to increase public confidence in the judiciary, especially because it was perceived as distancing the SCM from political influence. Over the years, however, public confidence suffered variations. For example, in the last 2 years, public confidence in the judiciary decreased by 11% (from 48% in 2015 to 37% in 2017). It is however interesting that 55% of those who expressed a tendency to distrust the judiciary have formed this opinion as a result of debates and information from the media and only 25% based their views on actual facts (e.g. criminal convictions of judges, civil or criminal litigations in which they were involved, etc.). It is to be stressed in this context that the opinions within the civil society regarding the judiciary and judicial self-government are highly divided: a part of the society feels threatened by a too insulated judiciary, whereas another part strongly supports an increased degree of autonomy, seen as a shield against corruption.

Figure 4. Public trust in judiciary. Source: Eurobarometer[85]

In a national poll conducted in 2015, when the subjects were asked their opinion about the fact that numerous politicians are accused, judged and convicted of corruption, 47% of the responses were very favourable and 30% favourable, which means that 77% of all respondents strongly supported anti-corruption measures.[86] These results endorse my theory that the image of the judiciary in Romania is strongly linked to the fight against corruption.

The creation and the reform of the SCM influenced judicial performance values (efficiency, access, effectiveness, competence, fairness, etc.), but the only measurable data can be found in the Council's own reports on the "state of the judiciary".[87]

The quality of the process of selecting magistrates also affects public confidence. The National Institute of Magistracy ensures the selection and training of junior judges and prosecutors. Admission to the NIM is subject to a highly difficult national competition, organized in a transparent way, which ensures the quality of the trainees. The training itself at the NIM is very complex, covering theoretical and practical issues, including matters of European law and Human Rights law and it ends with a final exam that grants

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[85] http://www.mediafax.ro/social/increderearomanilorinjustitiesisistemuljudiciarinscadereaccentuataeurobarometru15574460. For the 2017 data, http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2143.

[86] Alin Gavreliuc, *"Dreptatea" și „apărătorii dreptății" în imaginarul social românesc. Studiu de caz corupția,* in DESPRE JURIȘTI (Raluca Bercea, Alexandra Mercescu ed, 2017) 336–337.

[87] The 2016 SCM Report, https://www.csm1909.ro/PageDetails.aspx?PageId=267&FolderId=3570.

the trainees the right to become junior judges. Due to the better initial and continuous training of judges, but also to the publication of the case law, the quality of the decisions has improved over the years, especially as regards taking into account ECtHR and ECJ jurisprudence.

Other factors that affected public confidence were the appointments of senior prosecutors – the General Prosecutor of the HCCJ Prosecuting Office and the General Prosecutor of the DNA – but this was mainly due to political involvement in the nomination and appointment of the candidates than to the candidates themselves. Paradoxically, however, public trust in the DNA is still higher than public trust in the courts. This is due to the greater visibility of the institution regarding high level political corruption, despite the fact that some famous cases ended with acquittals or dismissals. The DNA is currently seen as the main vector of "purging" the society from the "corruption plague", especially in the wake of the repeated attempts by politicians to change the legislation and diminish the level of anti-corruption policies.

Scandals concerning judges and prosecutors accused of corruption or of being politically influenced (for example by "fabricating" files at political command in order to bring down the political opponents of powerful figures) could also influence public confidence in the judiciary. The media played a major role by inciting the view that a good part of the judiciary might be corrupt. It must be mentioned, though, that many of these media scandals were initiated by media trusts belonging to political magnates accused, in turn, of corruption or other criminal offences (money laundering, tax evasion, blackmail, etc.).[88]

The key public confidence issues on the judiciary in Romania are complex and multifarious. These concerns revolve around the activity of the judiciary, its effects on the public and the internal aspects of judicial organization. Among the salient factors that raised concerns on public confidence in judiciary are: independence and impartiality of individual judges and of the judiciary as a whole, length of proceedings, execution of judgments, and political pressures via media channels. Other internal challenges for the public image of the different parts of the judiciary, but which manifest periodically, are the appointment of top prosecutors and the elections for the SCM.

[88] For example, the campaigns against the former president of the High Court of Cassation and Justice, in which she was accused of manipulating evidence in a case against a person who accused her of not paying some private debts; the campaign against the general anticorruption prosecutor in which she was accused of plagiarizing her doctoral thesis. Some of the corruption scandals mentioned in the sections above were also important for the decrease in public confidence in the judiciary.

II. Thy Shall Have No Other Master before Me: Judicial Self-Government, Separation of Powers and Democracy

After the demise of the communist dictatorship, the principle of separation of powers was placed at the foundation of the post-communist Romanian constitutional system. Although neither the draft Constitution, nor the first version of the 1991 Constitution expressly enshrined this principle, the division of the state functions was present in the "letter and spirit" of the text. In 2003, by constitutional amendment, the separation of powers was expressly entrenched in Article 1(4) CR: the separation and balance of powers are a founding principle of the state organization, "within the constitutional democracy". In the absence of a constitutional definition, the most important developments of the separation of powers are provided by the Constitutional Court[89] or come from institutional practices. In a teleological and extensive interpretation of the principle – not only as mutual control of competencies, but also as a guarantee of good functioning – the Court emphasized the "importance, for the good operation of the rule of law, of the collaboration of powers, which must manifest in the spirit of the rules of constitutional loyalty, loyal behaviour being a guarantee of the principle of separation and balance of powers".[90]

In this equation, the introduction of judicial self-government in 1991 was not in itself a critical change, because the first SCM and the judiciary as a whole were still the "weaker link" of the separation of powers scheme. The 2003 Constitutional amendment turned out to be a dramatic shift to another "extreme": from an almost complete dependence on the executive, to an almost complete autonomy. Although, through its appointment and election procedure, as well as through its composition, all state powers seem to be involved in the SCM, in practice the autonomy of the Council and, with it, of the judiciary, is very high. To wit, in the separation of powers scheme, the judiciary has gained a stronger voice, including the possibility to address the Constitutional Court when it considers that other powers transgress its competence. As the Constitutional Court has stated, the dialogue between powers and the principle of loyal cooperation could be the key to a harmonious application of the separation and balance of powers.[91]

The current structure of the SCM and the judiciary's position in the state powers architecture have also shifted the understanding of the democratic principle in the sense that there is virtually no control of elected institutions over "the least dangerous branch" – transformed into "the least accountable branch".[92] Nevertheless, the public reaction to

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[89] RCC, Decision no. 63/2017.

[90] RCC, Decision no. 972/2012.

[91] *See* also Bogdan Dima, *The Authority of the Judicial Power,* in THE DIALOGUE BETWEEN THE JUDICIARY FROM ROMANIA AND THE OTHER AUTHORITIES OF STATE IN THE CONSOLIDATION OF THE RULE OF LAW (Rodica Aida Popa ed, 2016) 248.

[92] Kosař, *supra,* note 19 at 1.

illegitimate interferences of political authorities and especially of politicians (MPs, presidents of the Chambers, ministers) with the competence of the judicial power has become stronger in the last five years, proving a better understanding of what liberal democracy means: a legitimate mutual control of powers through constitutional means and not the subordination of the judiciary to the elected institutions in the name of "democratic legitimacy".

From the point of view of the judiciary itself, the understanding of democracy has dramatically changed, especially after 2000. This did not happen necessarily due to the existence and actions of the SCM, but more under external pressure (ECtHR, EU) and internal influence (the Constitutional Court's case law). This is especially true for the understanding of human rights, legal certainty and other fair trial guarantees indispensable for a truly democratic society: "The judge is legitimate in a democratic system not only because it obeys the Constitution or the laws but also because it promotes the democratic values".[93] The understanding of democracy in a country (still) in democratic transition should include, besides the fact that the judiciary can and must "control" political authorities, a higher degree of accountability, through constitutional means that do not affect its independence, to citizens or their representatives. One of these means could be a judicial self-governing body capable of protecting the system from external and internal dangers.

E. Conclusions – Judicial Self-Government and Rule-of-Law in Romania

The apparently perfect Romanian "Euro-model" of judicial self-government is, therefore, subjected to important perils, both from the outside and from the inside of the judiciary. The passage, in 2004, of the SCM "from an extreme to another, from total dependence to total independence"[94] resulted in an increased autonomy of the judiciary, and in a greater authority of the SCM within the judicial system, but it had little effect on transparency and accountability. Moreover, even in such an autonomous form, the Romanian JSG system was not sufficient for protecting the true independence of the judiciary against repeated assaults from the political sphere.

The literature has criticized the fact that "the absolute independence of the judicial system from the whole rest of the Romanian state architecture, including from citizens – whom it is supposed to serve – raises serious questions and contributes to the all the more accentuated fragmentation of social cohesion in Romania".[95] In my view, although these criticisms are partly justified, the autonomy of the judiciary was established as a reaction

[93] Dima, *supra* note 90 at 249.

[94] Dima & Tănăsescu, *supra* note 30 at 142.

[95] *Ibid* at 139.

to the tendency of the judiciary towards political obedience as well as to the high level of corruption that plagued the Romanian society. Therefore, this autonomy can still be deemed as the "lesser evil" in the big picture. If it were diminished at the present time, a certain backsliding would take place in this respect,[96] by encouraging the interference of political powers into judicial investigations and proceedings. This is proven by the repeated and aggressive attempts of the political power to diminish the anti-corruption tools, precisely on the grounds that the judiciary has gained too much power and autonomy.

Following unprecedented criticisms from the civil society, from the SCM and from a high number of magistrates, the Parliament has given up some of the dangerous changes that were initially proposed by the minister of justice in 2017, such as the placement of the Judicial Inspection under the authority of the Ministry of Justice. Nevertheless, many other new or amended provisions that menace judicial independence, especially as regards the anti-corruption fight, have remained in the adopted laws.[97] In May and June 2018, the Constitutional Court decided on two sets of unconstitutionality complaints against these laws. The new Law on Judicial Organization entered into force in July 2018, even with problematic changes that were however not dismissed by the Constitutional Court. Towards the end of the year, most of the other changes are expected to enter into force, despite further challenges at the Constitutional Court and despite the serious concerns raised by the European Commission in its latest CVM report.[98] The Romanian JSG model also has to fight against perils from the inside of the system: inner conflicts between the two branches of magistracy or within various institutions (e.g. DNA, SCM), lack of transparency, and the low accountability of judges, especially at higher courts and of the SCM itself. These threats may either turn the Romanian system from a "perfect" model on paper into a failed European experiment in practice, incapable of imposing the rule of law or, on the contrary, if resisted, may reinforce its position as a guardian of judicial independence and, indirectly, of the fight against corruption. The system is currently under constant and powerful pressure, but only the future will show its capacity to self-regulate and fulfil, despite the imperfections, its original task.

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[96] Venice Commission, *supra* note 7, §137.

[97] In its preliminary opinion, the Venice Commission also stated that: "Although welcome improvements have been brought to the drafts following criticism and a number of decisions of the Constitutional Court, it would be difficult not to see the danger that, together, these instruments could result in pressure on judges and prosecutors, and ultimately, undermine the independence of the judiciary and of its members and, coupled with the early retirement arrangements, its efficiency and its quality, with negative consequences for the fight against corruption", *supra* note 7, §162.

[98] *See* European Commission, COM(2018) 851 final, *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism,* Strasbourg, 13 November 2018 at 17: "The entry into force of the amended Justice laws, the pressure on judicial independence in general and on the National Anti-Corruption Directorate in particular, (...) have reversed or called into question the irreversibility of progress."

Articles

Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia

By Samuel Spáč, Katarína Šipulová,** & Marína Urbániková****

Abstract

The article discusses the development in the administration of the Slovak judiciary since the separation of Czechoslovakia and the impact of the empowerment of the judicial self-governance on the functioning of the judicial system. After independence, the administration of the judiciary initially rested in the hands of the executive. In 2002, Slovakia created its Judicial Council and transferred a considerable amount of powers on it, especially related to judicial careers. It was expected that this would de-politicize the judicial system. However, a high level of autonomy of the judiciary chiefly led to the empowerment of judicial elites. This reduced the democratic accountability of the judiciary, encapsulating it from society and enabling it to promote its own interests. Selection processes have often been used to fill judicial ranks with judges with close ties to the system. Accountability mechanisms such as promotions, disciplinary procedures or remuneration schemes were used to reward allies of those on the top of the hierarchy and to punish their critics. Still, adherence to EU-backed standards on the administration of the judiciary may have increased the legitimacy of the judiciary, while concentrating decision-making in one body enhanced transparency, which was furthered due to low public confidence resulting in unprecedented levels of information available about the Slovak judicial system. All in all, the Slovak example displays the dangers of establishing judicial self-governance in countries where an internal ethical culture and a strong sense of judicial duty are still lacking.

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A. Introduction

In less than 30 years since the breakdown of the communist regime, the administration of the Slovak judiciary has gone through a much turbulent development. Starting from a government controlled judiciary in the 1990s, particularly under Prime Minister Vladimír Mečiar,[1] the political branches enjoyed strong powers *vis-à-vis* the judicial branch and were not afraid to use them.[2] In 2001, in compliance with recommendations from the Council of Europe[3] and the European Commission, which exercised its pressure in the form of the accession conditionality,[4] Slovakia eventually adopted the 'Euro-model'[5] of court administration in the form of the Judicial Council, transferring considerable powers to the judiciary, especially in the area of personnel policies. The empowerment of the judiciary took place in a system where the legacies and legal culture of the communist regime have easily survived.[6] This article examines different models of judicial administration adopted in Slovakia, the reasons behind the major changes, and their effects on the functioning of the judicial system, given the post-communist context. Using the example of Slovakia, the article aims to show that the relationship between the existence of a judicial council and hence the separation of the judiciary from the influence of other branches of power is not

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[1] There are many labels attached to Mečiar's regime in Slovakia. Classifications differ from so-called "laggards" (ANDREW C. JANOS, EAST CENTRAL EUROPE IN THE MODERN WORLD: THE POLITICS OF THE BORDERLANDS FROM PRE- TO POSTCOMMUNISM (2000), "troubled democracies" (HERBERT KITSCHELT, POST-COMMUNIST PARTY SYSTEMS: COMPETITION, REPRESENTATION, AND INTER-PARTY COOPERATION (1999), at 42), and mixed cases (Commission on Security and Cooperation in Europe, Human Rights and Democratization in Slovakia, (1997), Available at: http://www.csce.gov/index.cfm?FuseAction=Files.Download&FileStore_id=267). See also VALERIE BUNCE AND SHARON WOLCHIK, DEFEATING AUTHORITARIAN LEADERS IN POST-COMMUNIST COUNTRIES (2011). Overall, the literature agrees on the undemocratic character of the Slovak regime up until 1998.

[2] See DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016), 254–256.

[3] Council of Europe, *Committee of Ministers. Recommendation No. R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges*. 13 October 1994, http://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanunteklifi/recR(94)12e.pdf.

[4] European Commission, *2000 Regular Report on Slovakia's Progress towards Accession*, November 2000. The suggestions to foster the introduction of proper judicial structures reach as far as to the first progress report from 1998. European Commission. Progress Report on Slovakia, 1998, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/1998/slovakia_en.pdf.

[5] See Michal Bobek and David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* 15 GERMAN L.J. 1257 (2015); and Kosař, *supra* note 2, at 126–136.

[6] As Uzelac writes, "socialist legal world was, by its nature, not that socialist" but rather consisted of particular practices, traditions and values. See Alan Uzelac, *Survival of the Third Tradition* 377 (2010) 49 SUPREME COURT L.R. For more on unsuccessful de-communization of the Slovak judiciary see also Martin Kovanič & Samuel Spáč, *Vyrovnanie sa s minulosťou v sudcovskom stave*, in NEDOTKUNTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993 – 2015 (Erik Láštic & Samuel Spáč, eds., 2018). Turnover in the Czech counterpart is estimated to be larger, see Samuel Spáč, JUDICIARY DEVELOPMENT AFTER THE BREAKDOWN OF COMMUNISM IN THE CZECH REPUBLIC AND SLOVAKIA (MA Thesis, Central European University 2013).

as clear cut as presented by prevailing literature addressing the issue of judicial self-governance ("JSG").[7]

There are several reasons for scepticism about the compatibility of the existing legal culture prevalent in the Slovak judiciary with the requirements placed on democratic judicial systems. Even after almost 30 years since the Velvet Revolution, there are still many judges who were appointed during the communist era. Additionally, the turnover in judicial ranks in the early 1990s was rather marginal, as Slovak political elites refrained from enforcing the Czechoslovak Lustration Law adopted in 1991,[8] hence even judges appointed after 1989 were socialized and educated in a system deaf to the idea of independence preventing the judiciary from a 'mental' transition to proper democratic values.[9] This is currently manifested in judges primarily seeing their roles as bureaucrats,[10] which affects both the application of law and the performance of JSG itself.[11]

Despite the fascinating history of the Slovak JSG, the existing literature on this topic is far from being exhaustive, and it disregards the wider social and cultural background in which JSG interacts with other branches of power. This article fills this gap, and through an in-depth analysis of the Judicial Council and other bodies partaking in judicial governance in Slovakia it offers new insights for the study of judicial self-governance and its impact. Furthermore, the article also discusses shifts in the relationship between the judiciary and other branches of government, as well as the implications of these shifts on the core values of the judiciary: independence, legitimacy, accountability, transparency, and public confidence. We opt for a holistic approach: we focus on both the structural setting and the allocation of formal powers, as well as on their translation into practice. It therefore brings novel and important findings for both legal and political science audiences.

The article proceeds as follows: first, section B analyses the rationales of judicial self-government in three stages: The early 1990s; the introduction of a judicial council during the accession to the EU process; and post-accession development. It focuses on the normative and practical changes in judicial independence and accountability. Section C incorporates a more sociological perspective and concentrates on the impact of the JSG on

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[7] For more see: David Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe* (in this special issue).

[8] See Kosař, *supra* note 2, at 240–243

[9] See Kovanič & Spáč, *supra* note 6, at 37–61.

[10] See Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries* 14 EUROPEAN PUBLIC LAW 99 (2008).

[11] See particularly András Sajó and Vera Losonci, *Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?* in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 289 (D.Greenberg, ed., 1993), at 322.

the legitimacy of the judiciary, on its transparency towards individual political and societal actors, and public trust and confidence in the judiciary. Section D analyses shifts in the political system and the relationship of the judiciary and JSG bodies towards other branches of power from the separation-of-powers perspective. Finally, Section E concludes.

B. The Politics of Judicial Independence and Judicial Accountability: from Ministerial Control to Self-Governance and Back?

As regards the institutional framework of judicial administration, development in Slovakia has been quite turbulent. In this part, we briefly describe the changes in this area, focusing on powers related to the professional careers of judges.[12] However, we do not focus solely on the institutional setup but also look at how formal powers translate into practice. In other words, in this chapter we focus predominantly on the *de jure* independence of the judiciary – referring to 'structural insulation' from political branches – and *de facto* independence,[13] i.e. execution of these formal powers through the selection of judges, their promotions, or accountability mechanisms.[14] Additionally, we discuss instances where independence, understood as an output feature of the judicial system, was at stake.[15] Similarly to independence, we also focus on multiple dimensions of accountability, comparing both the de jure and de facto consequences that the judiciary and individual judges may face in connection to their behavior at the hands of principals in different branches of power.[16]

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[12] Administrative and managerial powers have to a great extent always belonged to the Ministry of Justice. The Ministry decides about the number of courts, judges, law clerks or other court employees, as well as about the budget of the judicial system, and majority of technical and material equipment. The Ministry also manages all ICT systems used by the courts. The Supreme Court is an exception from this rule as it stands as an independent category in the budget approved by the parliament, however it still uses the same ICT systems, although it administers them on its own.

[13] Various vocabulary has been applied to this dichotomy – it is the difference between independence understood as means and ends, the difference between mechanisms and values, the difference between 'structural insulation' and 'impartiality', or the difference between institutional and decisional independence. For more see e.g.: Stephen B. Burbank and Barry Friedman, *Reconsidering Judicial Independence* in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9 (2002), at 9–42; or Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the role of Constitutional Norms in Congressional Regulation of the Courts*, 78 INDIANA L.J. 153 (2003), at 153–221; or Shimon Shetreet, *Judicial Independence and accountability: core values in liberal democracies* in JUDICIARIES IN COMPARATIVE PERSPECTIVE 3 (H.P.Lee, ed., 2011) at 3–24.

[14] Under the term 'judicial accountability' we include both decisional accountability and behavioral accountability, both on-the-bench and off-the-bench, both formal (e.g. disciplinary proceedings, remuneration) and informal (changing working conditions). For more see Kosař, *supra* note 2, at 25–120.

[15] See for instance Popova's definition which holds that "independent judiciary delivers decisions that do not consistently reflect preference of a particular group of actors" in Maria Popova, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012).

[16] See Kosař, *supra* note 2, at 25–72.

There are three distinguishable periods since the establishment of independent Slovakia in 1993. First, during Mečiar's government, the judiciary was to a large extent controlled by the Ministry of Justice with the help of the parliament. In 1998, when Mečiar's party lost the election to the pro-democratic broad coalition led by Mikuláš Dzurinda, establishing Slovakia as a trustworthy partner for western democracies became the highest priority. In this period, Slovak political elites did what they could to meet the criteria for successful integration,[17] including a fundamental reform of the judicial system. However, as judicial elites used this strong model of JSG for their own benefit, since 2010 politicians have sought a new arrangement for the administration of judicial careers, with the intention to counterbalance the dominance of judicial actors.

I. Judiciary Under Political Control (1993 – 1998)

During the communist regime, the judiciary was almost completely controlled by the ruling party – politicians decided on the appointment, promotion, and dismissal of judges.[18] Formally, the power was dispersed between the Ministers of Justice, parliaments,[19] and court presidents, and these actors preserved the power even after the revolution. Perhaps most importantly, judges did not have life tenure and their terms in office rested to a large extent in the hands of politicians. Czechoslovak parliament addressed this issue in 1991, and thereafter judges could be removed from office only as a result of a disciplinary senate decision. Otherwise, the Ministry remained largely in charge.

Slovakia inherited this framework, however the 1992 Constitution re-introduced limited 4-year terms for newly appointed judges, while they were appointed by the parliament (National Council of the Slovak Republic, "NCSR") upon the nomination of the Minister of Justice. If judges were re-elected after the 4-year probation period, they enjoyed life tenure. The European Commission repeatedly criticized this provision for the excessive control vested into the hands of political branches.[20] The European Commission stressed

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[17] See e.g. European Commission. *Progress report on Slovakia 1999*, p.14. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/1999/slovakia_en.pdf. Or European Commission, 2001 *Regular Report on Slovakia's progress towards accession*, SEC (20010 1475, 13 November 2001, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/2001/sk_en.pdf

[18] See e.g. Zdeněk Kühn, *Socialistická Justice*, In KOMUNISTICKÉ PRÁVO (Michal Bobek, Pavel Molek & Vojtěch Šimíček, eds., 2009); Hakeem O. Yusuf, *Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria*. 30 LAW & POLICY 194 (2008); DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (2003).

[19] We use plural here as Czechoslovakia was a federal state. Additionally, judges at the lowest level were elected by political representatives at the local level. See Kühn, *supra* note 18.

[20] The critique also addressed substantive execution of the powers. In 1997, the government refused to nominate 12 judges for re-election without any reasoning. See Kosař, *supra* note 2, at 256.

the need for and establishment of a judicial council to foster the independence of the judiciary from politicians.[21]

Another problematic aspect of the Slovak system was the strong position of the Ministry towards court presidents, as it was the Minister who appointed and could dismiss court presidents practically at will,[22] and once again, he did not hesitate to use this power.[23] The influence that political branches exercised over court presidents was another major tool of political control over the judiciary. First of all, during the communist regime, court presidents served as 'transmission belts' for political elites towards the judicial system, hence there was a good chance this practice survived in the first decade after the breakdown of the previous regime.[24] Court presidents controlled the assignment of cases, appointments of chamber presidents or their reassignments within courts and in this way they could secure desirable outcomes in their respective courts. Additionally, they also held crucial powers regarding the accountability of judges – they initiated disciplinary proceedings, and together with the Ministry decided on promotions and secondments of judges.[25]

In this period, there was no evidence of these powers being used either for rewarding allies or punishing critics of judicial or political elites.[26] This fact is interesting for several reasons, especially considering the tense relationship between the government and judges.[27] The largest judicial association, the Association of Judges of Slovakia, was occasionally very critical of the government or of the judges who publicly supported some of government's causes. First, it may be argued that the government did not need to resort to these tools, as they exercised sufficient control over the judiciary through appointments and some managerial measures – e.g. the considerable salary hike in the mid-1990s.

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[21] See for instance European Commission, *Agenda 2000*, *Progress report 1998*, *Monitoring reports 1999-2000*.

[22] The process was a little more complicated regarding the position of the Chief Justice of the Supreme Court, who was elected by the parliament, but the parliament could not dismiss him. However, when in 1997 the Chief Justice Milan Karabin resigned from this position to be replaced by Štefan Harabin, a judge much more closely associated with government parties, it officially happened for health-related reasons, yet Karabin shortly after that continued in his judicial career and eventually became Chief Justice again in 2003. See David Kosař & Samuel Spáč, *Predsedovia súdov: Od ministerských "spojok" k autonómnym aktérom*, in NEDOTKUNTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993 – 2015 (Erik Láštic & Samuel Spáč, eds., Univerzita Komenského, 2018).

[23] See Kosař, *supra* note 2, at 256.

[24] See Kosař, *supra* note 2, at 49.

[25] See Bobek & Kosař, *supra* note 5.

[26] See Kosař, *supra* note 2, at 338–339.

[27] Minister of Justice Jozef Liščák even referred to some judges as "buggers and frats stupid as cues." See See Kosař, supra *note* 2, at 255.

Second, refraining from a more fundamental use of judicial accountability measures may indicate either the government's ambition – possibly a very weak one – to become a standard democratic country, or a lack of courage to strongly oppose democratic forces within the society. Despite its nationalistic rhetoric and use of authoritative methods, the government, in 1995, partially submitted to the European Commission's calls for more autonomy of the judicial branch by establishing judicial boards at the Supreme and regional courts, as well as the Council of Judges of the Slovak Republic.[28] Nevertheless, although this institution represented the JSG, it was vested only with consultative powers, which the government did not use in practice.[29] Yet, it deserves to be stressed that judges who criticized the government did not face any extraordinary repercussions. For some of them, especially those representing the Association of Judges of Slovakia, hard times came about a decade later.[30]

II. Empowering Judges: From Euro-Optimism to Disillusion (1998 – 2010)

1. Euro-Model of Judicial Self-Governance: Changes, Rationales, and Powers

Parliamentary elections in 1998 marked an important milestone in the history of Slovakia.[31] The parties of Mečiar's government were replaced by a broad pro-democratic coalition led by Mikuláš Dzurinda. The main goal of this was to catch up with the rest of the Visegrad group and make the country acceptable to Western democracies. It was an era of almost unconditional Euro-optimism, accompanied by numerous reforms, including the reform of judicial administration. First, a new Law on Judges was passed in 2000, securing life tenure for judges, eliminating probation periods, and transferring the appointment competence from the parliament to the President, who acted upon the nomination by the Minister of Justice. A further move towards the 'Euro-model'[32] of judicial administration took place in 2001 when a Constitutional amendment established the Judicial Council of the Slovak Republic (JCSR),[33] and the Act on the JCSR passed in the parliament the following year.[34] In

[28] See Kosař, *supra* note 2, at 255.

[29] In 1997, when the parliament, upon nomination by the Minister, elected Štefan Harabin to become Chief Justice of the Supreme Court, neither the judicial board of the Supreme Court nor the Council favored the appointment. For more see Kosař & Spáč, *supra* note 22.

[30] See the following Section.

[31] See Bunce & Wolchik, *supra* note 1.

[32] See Bobek & Kosař, *supra* note 5; Kosař, *supra* note 2, at 126–136.

[33] The amendment included a larger bulk of reforms concerning the Constitutional Court, preparing the ground for Slovak accession to the EU, creation of the Supreme Audit Office of the Slovak Republic and reforms regarding regional self-government.

[34] Act No. 185/2002 on the Judicial Council

addition, the Judicial Academy of the Slovak Republic was established in 2003 as an institution fostering the independent education of judges.[35]

The explanatory memorandum for the amendment establishing the JCSR was at times rather vague, referring only to the increase of the quality of democracy, strengthening the independence and autonomy of the judiciary, and 'an honest interest to become a member of the family of European states'. However, parts of the explanatory memorandum specify that the reform was inspired by several international documents – namely, UN Basic Principles on the Independence of the Judiciary, Recommendation R (94) 12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges, as well as by the European Charter on the Statute of Judges, and is a response to the critique from observers in the accession process.[36] The main arguments heard in the debate in favor of the proposal posited that the amendment was necessary if Slovakia wanted to be a member of the European Union,[37] but the general tone simply suggested that the coalition perceived the adoption of the Council model as the 'right solution', and that it should secure independence, protect the judiciary from the capriciousness of political elites, and even improve the unsatisfactory performance of the judicial system.[38] Despite the discussion in the parliament, many argue that the adoption of the JCSR was mostly a stance against 'mečiarism' – an autocratic style of government represented by former Prime Minister Vladimír Mečiar – and the EU argument was used to simply legitimize this process.[39]

Originally, the JCSR consisted of eight judges elected by their peers, three members elected by the parliament, three members appointed by the government, and three members appointed by the President of the Slovak Republic, all serving a maximum of two consecutive five-year terms. The last member of the JCSR was its president, who was elected by the other members of the JCSR out of the judges of the Supreme Court, and

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[35] The idea for such an institution had been promoted by the Association of Judges of Slovakia since 1995, but successfully started its operation only in September 2004. The Academy is governed by a ten-member Board: five nominated by the JCSR from all judges, five nominated by the Minister of Justice, two of them upon the suggestion of the General Prosecutor. Until 2009, at least two members nominated by the Minister had to be judges, thus securing a clear majority for judicial actors.

[36] See Spáč, *supra* note 6.

[37] See Spáč, *supra* note 6, at 60–64.

[38] See Alexander Bröstl, *At the Crossroads on the Way to an Independent Slovak Judiciary* in SYSTEMS OF JUSTICE IN TRANSITION: CENTRAL AND EASTERN EUROPEAN EXPERIENCES SINCE 1989 (Jiři Přibáň, Pauline Roberts & James Young, eds., 2003); or Pavol Rohárik, *The Judiciary and Its Transition in Slovakia after 1989* in SYSTEMS OF JUSTICE IN TRANSITION: CENTRAL AND EASTERN EUROPEAN EXPERIENCES SINCE 1989 (Jiři Přibáň, Pauline Roberts & James Young, eds., 2003).

[39] See Kosař, supra note 2; and Ján Svák, *Slovenská skúsenosť s optimalizáciou modelu správy súdnictva* in HLEDÁNÍ OPTIMÁLNEHO MODELU SPRÁVY SOUDNICTVÍ PRO ČESKOU REPUBLIKU (J.Kysela, ed., 2008); and Tim Haughton, *Exit Choice and Legacy: Explaining Patterns of Party Politics in Post-communist Slovakia*"30 EAST EUROPEAN POLITICS 210 (2014).

who at the same time served as the Chief Justice of the Supreme Court. This person therefore enjoyed the dual role of being a very strong actor within the Supreme Court, while at the same time having the power to oversee and influence practically all major decisions in the judicial system. The logic behind the composition was to secure parity between judicial and non-judicial members. Nine judges were supposed to represent the Supreme Court and the eight regional circuits of the Slovak judiciary,[40] the remaining nine members, nominated by political branches, were supposed to ensure the balance of interests between judges and politicians.

However, as neither the Constitution nor the Law specified that nominees of political branches shall not be judges,[41] in the JCSR's 15 years of existence, judges have always had a clear majority.[42] This fact should not be too surprising. Since the introduction of the JCSR, the government, parliamentary majority, as well as the office of the President predominantly belonged to politicians who opposed the adopted composition of this body. The only competing proposal in the parliamentary debate was presented by Štefan Harabin, at that time the Chief Justice of the Supreme Court, who argued for a composition with ten judges and six nominees from the Parliament. Harabin later served as the Minister of Justice (2006-2009), and during his term appointed only judges. Harabin's proposal was backed mainly by the opposition MPs, including Ivan Gašparovič, who served as the President of Slovakia between 2004 and 2014, who filled three out of six positions with judges during his term. Additionally, the proposal was backed by – at that time – independent MP Robert Fico, who later became the Prime Minister, serving from 2006 until 14 March 2018, with a 21-month intermission between 2010 and 2012.

2. Judicial Self-Governance in Practice: Misusing Vested Powers for the Benefit of the Judicial Elite

The role the JCSR is supposed to play in the political system has never been clear. Most of its powers are related to the professional careers of judges, and our calculation shows that as much as 63% of almost 3,200 resolutions adopted by the JCSR between 2002 and May 2017 addressed personalmatters. The JCSR has since its establishment been a powerful actor in the appointment, promotion, and secondment of judges, and with considerable powers in disciplining as well as dismissing judges due to their age; although the actual act

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[40] See Svák, *supra* note 39.

[41] The explanatory note actually included the expectation that political branches will nominate experts in law or representatives of other legal professions.

[42] Between 2002 and 2007 there were twelve judges to six non-judges at the JCSR. Between 2007 and 2012, the ratio shifted to sixteen judges to two-non-judges. Since then, there have always been at least thirteen judges among the members of the JCSR. All in all, political branches have so far nominated 40 members to the JCSR, 20 of whom were judges.

of dismissal must be carried out by the President, the nomination by the JCSR is necessary. However, what is not clear is whether the JCSR holds a gatekeeper position – i.e. an institution with final say in these matters – or if it is an intermediary that legitimizes decisions made elsewhere. Up until 2011, district courts could select new judges from among the so-called judicial candidates (*justiční čakatelia*) serving the court.[43] The JCSR only formally confirmed their nominations by forwarding them to the President for appointment. Similarly, individual court presidents also dealt with promotions and secondments, and the JCSR only 'rubber stamped' their agreements. On the other hand, the JCSR has always decided about the composition and work schedule of disciplinary senates.[44]

Despite the existence of the JCSR, powers regarding the professional careers of judges were dispersed among several actors within the judicial system, with only very few effective checks and balances held by the political branches. For instance, although the character of the court presidents' involvement was considerably different from the communist era and the 1990s, they still remained very powerful. They had a huge informal impact on any development in the judicial system, but also enjoyed a significant say in disciplinary proceedings, as they had the power to initiate them and exercised this power frequently.[45] This unbalanced setup, based on the illusion that judges were guardians of merit-based decision making who would protect the judiciary from undue pressure, started to crumble shortly after Slovak accession to the EU in 2004.

After the parliamentary elections in 2006, the rightist pro-European government was replaced by a leftist-nationalist government led by Robert Fico, who created a controversial coalition with two parties from Mečiar's 1994-1998 government – the Slovak National Party (SNS), and Mečiar's own Movement for Democratic Slovakia (HZDS). The government appointed Štefan Harabin as the Minister of Justice. Elected in 1997 under

[43] This issue was influenced by political conflict regarding the status of 'judicial candidates.' Centre-right governments preferred open selection procedures, leftist and nationalistic parties favored 'judicial candidates' trained and socialized within the system. As a consequence, even before 2011 when selection procedures became obligatory, judges were commonly selected in competitive procedures as positions of 'judicial candidates' were often left vacant by the decision of the Minister of Justice. This was changed in 2008 by the leftist-nationalist government represented by Minister Štefan Harabin, who enacted into law the preference for 'judicial candidates.' For more see: Juraj Palúš, *Právna úprava výberu sudcov na Slovensku* in PRÍSTUP K SPRAVODLIVOSTI – BARIÉRY A VÝCHODISKÁ: VÝBER SUDCOV (Kristína Babiaková, ed., 2015).

[44] There are two types of disciplinary senates. In the first instance, the senate consists of three members elected by the JCSR upon nomination by judicial boards, the parliament and the Minister. In the second instance, senates have five members, one nominated by judicial boards, and two nominated by the parliament and the Minister each. Until 2012 there was no requirement to include any non-judges in the senates, hence disciplinary procedures were clearly dominated by judicial actors.

[45] See Kosař, *supra* note 2, at 299–332.

Mečiar's government, he was the former Chief Justice of the Supreme Court and had managed to polarize the judicial system during his term in office.[46]

As Minister, Harabin was not reluctant to utilize his powers. One measure that increased his popularity in the judicial ranks was the re-establishment of 'judicial candidates' as a preferred way of filling vacant judicial positions. This was largely appreciated among the judges, as it gave courts – and its presidents and judicial boards – much more control over the selection of their new colleagues. In 2012, as many as one in five judges had at least one family member working in the judiciary.[47] He also vastly and purposefully utilized the power to appoint court presidents when during his term 31 out of 54 district court presidents changed, as well as 4 out of 8 presidents of regional courts, hence changing altogether 56% of presidents of district and regional courts.[48] Apparently, appointment of court presidents remained of interest for ministers, even though their powers became much more limited.[49] Additionally, three of these new court presidents were at the time members of the JCSR, two elected by judges, one nominated to the JCSR by Harabin himself. Also, Harabin used his power to temporarily assign judges from different courts to the Ministry of Justice where they participated in the preparation of judicial policies, supporting some judges' perceptions that Harabin was a champion of judges' interests. In the same fashion, Harabin also chose a judge, Daniel Hudák, as his Deputy Minister. Hudák, who was simultaneously Harabin's nominee to the JCSR, was thus both an active representative of the government and a member of the judiciary.

In 2009, while still serving as Minister, Štefan Harabin was elected Chairman of the JCSR and Chief Justice of the Supreme Court, in part by those who were either nominated by him to the JCSR, or by those whom he had promoted in some other way.[50] Even though the

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[46] For more about Harabin see Kosař, *supra* note 2, at 248–254.

[47] Gabreil Šipoš, Samuel Spáč & Peter Klátik. *Kto je s kým rodina na našich súdoch*; available at: https://transparency.blog.sme.sk/c/342665/Kto-je-s-kym-rodina-na-nasich-sudoch.html

[48] Although previous ministers used this power as well, none of them had done so to a comparable degree as Harabin. Available data show that Minister Ján Čarnogurský (1998 – 2002) changed altogether 33% of court presidents, Daniel Lipšic (2002 – 2006) changed 26% of court presidents, and Lucia Žitňanská (2006) changed 7% of court presidents. Once Harabin left the office this practice became much more common. Since 2010 there have been two governments with two Ministers of Justice; both of them changed about 50% of court presidents. For more see Kosař & Spáč, supra note 22. Among court presidents who were dismissed by Harabin was Ľudovít Bradáč from the regional court in Banská Bystrica, who was one of most notable representatives of the Association of Judges of Slovakia, which was very critical of Mečiar's government during 1990s.

[49] Most notably, in 2002, court presidents lost their power to assign cases to judges due to the adoption of a system of computerized random assignment. See Katarína Staroňová, *Projekt ‚Súdny manažment' ako protikorupčný nástroj* in JEDENÁSŤ STATOČNÝCH: PRÍPADOVÉ ŠTÚDIE PROTIKORUPČNÝCH NÁSTROJOV NA SLOVENSKU (Emília Sičáková Beblavá & Miroslav Beblavý, eds. 2008).

[50] For more see Kosař & Spáč, *supra* note 22.

mechanisms of judicial accountability have produced outcomes that could be labelled as 'accountability perversions' since 1993 – mainly accountability avoidance, simulating judicial accountability or selective accountability – [51] the situation worsened once Harabin acquired the powers of this dual role. Most prominently, Harabin, with the support of his allies, used his influence to punish his critics through disciplinary procedures. At least fifteen judges were subjected to disciplinary procedures that resembled bullying[52] or have been described as an 'output perversion of judicial accountability.'[53]

One common strategy was to initiate accountability procedures against recalcitrant judges, often for conduct which could have been easily found in the work of his loyal supporters, who either never faced any disciplinary measures or got off with minor sanctions.[54] Juraj Majchrák was one of the judges who was targeted by these disciplinary procedures. He was a Supreme Court Judge known for his critique of Štefan Harabin[55] and a prominent representative of the Association of the Judges of Slovakia during the 1990s. He also played an important role in the creation of the JCSR. Majchrák was subjected to three disciplinary proceedings[56] for delays, which are very common in court operations in Slovakia. As Slovakia ranks among the least efficient judicial systems in the EU[57] some delays in proceedings can most likely be found in the work of the vast majority of judges, suggesting that this disciplinary motion selectively targeted Majchrák for openly criticizing Harabin.

Disciplinary motions were not the only accountability mechanism widely used for the benefit of those in power in the judiciary. First, as Chief Justice, Štefan Harabin had the power to award salary bonuses to Supreme Court judges. Especially in 2009, these reached astronomic numbers, when four judges, all members of the JCSR, received bonuses of between 50,000 and 70,000 euros, which effectively more than doubled their annual

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[51] See Kosař, *supra* note 2, at 68-72 and 264-332; or Pavol Žilinčík & Samuel Spáč, *Selektívna zúčtovateľnosť: Príklady z disciplinárneho súdnictva*, in NEDOTKUNTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993 – 2015 (Erik Láštic & Samuel Spáč, eds., Univerzita Komenského 2018).

[52] See LUKASZ BOJARSKI & WERNER STEMKER KÖSTER, THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES (2012).

[53] See Kosař, *supra* note 2, at 68–72.

[54] See Žilinčík & Spáč, *supra* note 51.

[55] In 2000, Majchrák, while in position of Vice-president of the Supreme Court, addressed a critical letter to Štefan Harabin, at that time Chief Justice of the Supreme Court, expressing his concerns and disapproval of Harabin's actions in office. See: http://www.sudcovia.sk/sk/dokumenty/1334-otvoreny-list-juraja-majchraka-stefanovi-harabinovi-z-8-8-2000

[56] For more information about disciplinary procedures against judges critical of Harabin and his allies see: http://www.sudcovia.sk/sk/dokumenty/disciplinarne-konania/406-14disck-14ot

[57] See e.g. CEPEJ – Council of Europe, *European Judicial Systems: Efficiency and Quality of Justice* (2016).

salaries.[58] Second, the use of case-assignment and the re-assignment of judges – especially outside of their original specialization – became increasingly employed strategies used to put pressure on, and hence to control, some judges. This all led to an initiative in 2009 in which 15 judges sent a letter to the main constitutional officials of the country protesting against the use of disciplinary procedures that interfered with the independence of judges. This initiative eventually resulted in the adoption of the *Five Sentences* statement supported by 105 judges (out of approximately 1,300).[59]

3. Consequences of Judicial Self-Governance: Broken Promises of the Euro-Model

The pattern of using power in favor of judges and their personal gains had considerable spillover to the actual decision-making of the courts. The media covered several issues that suggested that courts at times deliver decisions that are consistently in line with some actors' preferences, thus painting a bleak picture of the output independence of the Slovak judiciary.[60] Štefan Harabin himself was particularly effective in defamation lawsuits against the media and the Office of the General Prosecutor.[61] There was also a suspicion that the president of the respective district court, a long-time supporter of Harabin, changed the previously random system of case assignment shortly before Harabin filed his lawsuit, which could as a result be assigned only to one of three young judges.[62] In a similar fashion, several of the famous 'anti-discriminatory' lawsuits filled by 870 judges against the state after the Constitutional Court found the salaries of Special Court[63] discriminatorily high compared to the rest of the judiciary,[64] were decided by some of the judges who filled the lawsuit. Finally, there are general concerns among the public on whether the judiciary

[58] See Kosař, supra note 2, at 326; ZUZANA ČAPUTOVÁ & EVA KOVÁČECHOVÁ, PRÍSTUP K SPRAVODLIVOSTI. BARIÉRY A VÝCHODISKÁ. VYBRANÉ ASPEKTY DISCIPLINÁRNÍHO SÚDNICTVA, (2012). Available at: https://viaiuris.sk/wp-content/uploads/2017/08/pilk-2012.pdf.

[59] This initiative later led to the establishment of a new judicial association called 'For Open Justice'. For more see Bojarski & Stemker Köster, *supra* note 52, at 76.

[60] For the definition of judicial independence as a feature of output see Popova, *supra* note 15.

[61] The General Prosecutor unlawfully confirmed the existence of a recording of Harabin's phone call with an Albanian living in Slovakia, Baki Sadiki, who had in the past been accused of committing drug crimes. This incident has been frequently used against Harabin by his political opponents in the public debate. See: Matúš Burčík, *Harabin dostane za potvrdenie telefonátu so Sadikim 150-tisíc eur*. SME, November 6, 2013.

[62] In addition, all of these judges were nominated for judgeship in September 2009 by the JCSR, which was at the time led by Štefan Harabin. For more see: Veronika Prušová, *Šefka súdu pomohla náhode aj pri pridelení Harabinovej žaloby*. SME, May 5, 2013.

[63] For more on the issue of Slovak Specialized Criminal Court see: MATTHEW STEPHENSON, SPECIALIZED ANTI-CORRUPTION COURTS: SLOVAKIA (2016).

[64] Slovak Constitutional Court, judgment of 20 May 2009, PL. ÚS 17/2008.

decides cases independently,[65] although these concerns may also be related to the perception of widespread political corruption and the impunity of powerful actors.

Figure 1 below portrays the shift in the competences of the actors participating in JSG brought by the introduction of the JCSR. The early 1990s political system understood JSG as a product of the interaction of the triangle of actors: the parliament, the Ministry, and the judiciary. Nevertheless, the concentration of power was clearly in the hands of the executive (Figure 1, black grading), which under the government of PM Mečiar controlled both the parliament and the court presidents (via ministerial nominations). After 1998, the Slovak judiciary gained considerable powers regarding its own administration, particularly those concerned with the professional careers of judges. The year 2002 and the introduction of the JCSR shifted this triangle and almost completely eliminated the influence of the National Council, although, as we will argue later, the impact of the JCSR on the separation of powers and shape of the democratic political system were lacking in the Slovak discussions surrounding the establishment of the Council. Still, the JCSR's introduction shifted the influence and position of individual constitutional actors. Most of the powers are currently concentrated with the JCSR itself. Court presidents are potentially still one of the important stakeholders, although they do not exercise this power.

Figure 1: Competences of judicial governance actors (Source: authors)

[65] For instance, in the Global Corruption Barometer 2013, the judiciary was perceived as the most corrupt institution in Slovakia. Transparency International, GLOBAL CORRUPTION BAROMETER (2013). Also, concerns about independence can be found in Klaus Schwab and Xavier Sala-i-Martín, THE GLOBAL COMPETITIVENESS REPORT 2015-2016 (2016).

However, the Euro-model failed to deliver what was expected. Not only did the JCSR fail to eliminate possible undue influence over the judiciary exercised through the administration of professional careers, but under Harabin's chairmanship, accountability mechanisms suffered even more deficiencies than before and became tools for rewarding his allies and punishing his critics and opponents. These practices, reminiscent of 'mafia-like structures',[66] led to a deep divide within the judicial branch, while increasing the salience of judicial issues among the public and politicians.

III. Building (New) Trust between Judges and Politicians? (2010 – 2017)

Harabin's era in the most powerful position in the Slovak judicial system attracted a lot of attention from unlikely sources. In June 2009, on the day of his election to the post of Chairman of the JCSR, approximately 300 people protested in front of the building where the election was taking place. The demonstration was led by the NGO Fair-Play Alliance and was supported by many judges, lawyers and public figures.[67] Disciplinary proceedings against Harabin's critics were attended by embassy representatives from some of Slovakia's allies in the EU and NATO.[68] The 2010 Parliamentary elections brought to power a new coalition led by Iveta Radičová. Its Minister of Justice, Lucia Žitňanská, was clearly determined to limit the power of judges in order to prevent the repetition of past events. This intention remained even when after the breakdown of the government in late 2011, and consequently, after the 2012 elections which led to SMER-SD, a leftist party and main coalition partner of 2006-2010 government, being able to form the government by itself.

The 2011 reform focused on procedures regulating the selection, promotion and discipline of judges and aimed at a considerable increase in the transparency of the judicial branch.[69] First, as regards the selection of judges, the new law introduced selection through open, competitive and very structured procedures. The committees selecting new judges consisted of at least three judges – two nominated by the JCSR, and one nominated by the judicial board of the court where the procedure was taking place, counterbalanced by two members nominated by political branches, ensuring the dominance of the judiciary.[70] Despite the introduction of mandatory selection procedures, the process still seemed to

[66] See Bobek & Kosař, *supra* note 5.

[67] *Červená pre Harabina*, Pluska, June 10, 2009. Available at: http://www.pluska.sk/old/aktuality/cervena-pre-harabina.html

[68] Veronika Prušová, *Harabin: Diplomati si kupujú sudcov darčekmi*, SME, May 20, 2010. Available at: https://domov.sme.sk/c/5383790/harabin-diplomati-si-kupuju-sudcov-darcekmi.html

[69] See the following Section and SAMUEL SPÁČ, MATEJ ŠIMALČÍK & GABRIEL ŠÍPOŠ, LET'S JUDGE THE JUDGES: HOW SLOVAKIA OPENED ITS JUDICIARY TO UNPRECEDENTED PUBLIC CONTROL (2018).

[70] After the reform there were actually three political nominees and two judicial nominees, which was struck down by the Constitutional Court. See Section C.I.

favor candidates with ties to the judiciary – either family relations or connections to people sitting on the selection committees.[71] As a consequence, in 2017, the new government attempted to restructure the process and fill all vacant district court positions through collective selection procedures organized at the regional courts. New judges are now selected by five-member committees consisting of two members nominated by the JCSR, two members nominated by the Minister, and one member elected by the collegium of judicial boards of the given region.

In 2011, the process of promoting judges to higher courts was transformed in 2011 in a similar fashion. At that time, the composition of the committee was at the time similar, but a change implemented in 2017 meant that the president of the regional court, or the Chief Justice of the Supreme Court would create a five-member committee in which one member is selected from the list created by the JCSR, two are selected from the list crated by the Minister, one is elected by the judicial board of the given court, and one is elected by the collegium in which there is a vacant position.

Changes in the processes of selecting and promoting judges resulted in more involvement of the other branches of power. Somewhat similar logic guided changes related to the composition of disciplinary senates. Since 2012, there has been an obligation to include non-judicial members to ensure a lay component counterweighing judicial dominance, which had proved to be hazardous in the previous years.

The process of selecting court presidents went through a somewhat similar modification, but in reverse. The executive had held this almost unrestricted competence for years. However, since 2011, court presidents are also selected by five-member committees. As many as three members of the committee are nominated by the Minister of Justice, meaning the executive branch has retained control over the process, but the remaining spots are reserved for one judge nominated by the JCSR, and one by the judicial board of the court.

Finally, a major change regarding the composition of the JCSR – the first and so far only since its establishment – took place in 2014. In order to avoid concentrating too much power in the hands of one actor, the positions of the Chairman of the JCSR and the Chief Justice of the Supreme Court were separated. Consequently, the number of judges elected by judges was raised to nine.

Developments since 2010 in the matter of administering judicial careers show that there was, just as in any other relationship where the trust between partners has been repeatedly trampled, a need to demarcate new boundaries aimed at building trust among

[71] For more see: Samuel Spáč, BY THE JUDGES, FOR THE JUDGES: THE STUDY OF JUDICIAL SELECTION IN SLOVAKIA, (Dissertation Thesis, Comenius University, 2017), at 90–125.

actors. These new developments have common themes: adopting new checks and balances into previously existing mechanisms as well as preventing a dangerous concentration of powers, both without compromising the core idea of the judicial administration that has been in place since 2001 – i.e. the dominance of the judicial branch over other branches of government.

Figure 2: Relationship of the JCSR to other institutions and bodies (Source: authors)

It can therefore be concluded that there are three categories of ties between the JCSR and other bodies taking part in JSG. The first is a group of bodies that are predominantly created by the JCSR and belong under its sphere of influence; this group is represented by the disciplinary senates and the Judicial Academy. The second group is comprised of bodies that are semi-independent of the JCSR; the JCSR has only limited influence in the selection of its members, although it may also act as a gatekeeper. Nevertheless, it rarely uses these competences. The third category represents independent JSG bodies (judicial boards and court presidents), which interact but do not depend on the JCSR.

C. Judicial Administration and the 'Outside' World: Legitimacy, Public Confidence, and Transparency

As shown in the previous sections, Slovakia enacted the recommended model of JSG in the form of a strong judicial council with a majority representation of judges. Yet the turbulent political and societal developments in the 1990s justly raise questions of the impact of the JCSR on the judiciary and its position within the political system. This section therefore

moves from the legalistic and normative historical description of the Slovak JSG model and focuses more on its impact and social acceptance, with specific attention paid to the legitimacy of the judiciary, transparency of the court system and of the judicial administration, and the development of public trust in the judiciary and its relation to changing JSG.

I. Legal and Normative Legitimacy of the Slovak Judiciary

The JCSR, as a central institution in the Slovak system of judicial administration, is intended be a body that represents judicial legitimacy, which, together with independence and accountability, belongs among the core elements of judicial systems.[72] Indeed, it is difficult to untangle what legitimacy actually means. There is a plethora of academic works analyzing different dimensions of legitimacy,[73] suggesting there is no common understanding of the concept.[74] In the following part we differentiate between legal legitimacy/legality,[75] the normative dimension of legitimacy,[76] and its social dimension.[77]

The legal legitimacy of judicial administration and the bodies conducting it is secured through the entrenchment of all of the core regulations in the Act on Judges and Lay Judges[78] and the Act on Courts.[79] Above that stands the JCSR, which is both rooted in the Constitution[80] and further regulated by the Act on the JCSR.[81] Additionally, the Constitution

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[72] On the concept of legitimacy see e.g. James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 THE AMERICAN POLITICAL SCIENCE REVIEW 343 (1998), at 343; and W. S. Richards, *Survey article: the legitimacy of Supreme Courts in the context of globalization*, 4 UTRECHT L.R. 104 (2008), at 104.

[73] See e.g. Peter G. Stillman, *The Concept of Legitimacy*, 7 POLITY 32 (1974), at 32; and David Beetham, THE LEGITIMATION OF POWER (2013), or Başak Çalı, Anne Koch, Nicola Bruch, *The Legitimacy of Human Rights Courts, A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUMAN RIGHTS QUARTERLY 955 (2013), at 955.

[74] See e.g. CARL SCHMITT, LEGALITY AND LEGITIMACY (2004); and DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMAN HELLER IN WEIMAR (1999).

[75] *Supra* note 74; and various contributions in: LEGITIMACY IN INTERNATIONAL LAW (Rudiger Wolfrum & Volker Roben ed. 2008).

[76] Allen Buchanan & Robert Keohane. *The Legitimacy of Global Governance Institutions.* 20.4 *ETHICS & INTERNATIONAL AFFAIRS* 405 (2006).

[77] Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACADEMY OF MANAGEMENT REVIEW 571 (1995), at 571.

[78] Act No. 385/2000 Coll.

[79] Act No. 757/2004 Coll.

[80] Art. 141a of the Slovak Constitution

[81] Act No. 185/2002 Coll

raises the demand that the judiciary be independent and impartial,[82] however it does not specify the normative meaning of this provision. From this perspective, the normative legitimacy of the existing model of judicial administration is secured in two ways: first, by the set of international recommendations on fostering judicial independence that guided the 2001 Constitutional amendment,[83] and second, through the Constitutional Court's case law, which clarified the relationship between the formal rules and provisions regulating the JSCR and the principles of judicial independence.[84]

There have been two decisions that interpreted whether the legally enacted model conforms to the ideals of the rule of law, the separation of powers and the judicial independence entrenched in the Constitution. First, in 2014, upon a petition submitted by a group of MPs, the Constitutional Court decided[85] that the composition of selection committees under the 2011 reform,[86] which gives a majority to nominees of political branches, breaches the idea of independence.[87] Additionally, the same decision also declared it unconstitutional for the Minister of Justice to dismiss court presidents at her own discretion – this, as we have shown, was a common practice in past. The Constitutional Court admitted that while the competence of the Minister has a clear basis in the law, it also pointed out the lack of any safeguards against the arbitrary use of this competence.

In a 2015 decision, the Constitutional Court expressed another legitimacy concern when it sided in favor of legislation that held that it was at odds to concurrently serve as both court president (or vice-president) and a member of the JCSR. As court presidents are appointed by the Minister, there were concerns that doubts would be cast on such members due to conflicts of interest.[88] In both of these decisions, the Constitutional Court justified its decisions with direct references to the JCSR's role of ensuring judicial legitimacy. We can therefore argue that the Constitutional Court protects judicial legitimacy by demarcating the borders of permissible political involvement in the administration of judicial careers.

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[82] Art. 141 of the Slovak Constitution

[83] See the Section B.2.I.

[84] It needs to be stressed that the Constitutional Court cannot initiate a review, and hence acts only if some other institution files a petition. Within the scope of judicial administration, this power belongs to the JCSR, among other actors.

[85] Slovak Constitutional Court, judgment of 8 May 2014, PL. ÚS 102/2011.

[86] See the Section B.3.

[87] The JCSR, led by Harabin, refused to nominate judges selected by such committees for appointment. After the change in government in 2012, Minister Tomáš Borec sought compromise by nominating, almost exclusively, judges on his 'list' who would eventually be accepted by the JCSR.

[88] Slovak Constitutional Court, judgement of November 8, 2015, PL. ÚS 2/2012.

II. Wider effects of the JSG: Public Confidence in the Slovak Judiciary

The establishment of the JCSR and its turbulent, and at times controversial, development also influenced the relationship of the judicial system with the world beyond political institutions, particularly the relationship with the public. One of the most important facets of this relationship is public confidence in the judiciary, which can be described as positive expectations regarding the conduct of judges and courts.[89]

As regards the public's confidence in the Slovak judiciary, the picture has been bleak for years: public confidence in the Slovak justice/legal system constantly belongs among the lowest in the entire European Union.[90] Figure 3 shows that the level of public distrust in the courts rose markedly between 1997 and 2002[91] and it has remained high ever since, in spite of the introduction of the Judicial Council in 2001. Throughout the last decade, only roughly one-third of Slovak citizens claimed to have trust in the courts. In 2016, the share of distrusting respondents decreased for the first time in a decade. This could be related to the reassignment of those who held top positions of the judiciary, and fewer scandals and affairs involving judges, which led to lower public and media salience of the judiciary as an issue.

[89] Roy J. Lewicki, Daniel J. McAllister & Robert J. Bies *Trust and Distrust: New Relationships and Realities*, 23 ACADEMY OF MANAGEMENT REVIEW 438 (1998), at 438–58.

[90] Eurobarometer 385. JUSTICE IN THE EU.

[91] Besides other factors, a steep increase of distrust between 1997 and 2002 could be a consequence of the widespread feeling of injustice related to general political atmosphere in the country and its various financial frauds, and even murders, which had not been investigated and their culprits remained unconvicted. So-called Mečiar´s amnesties can serve as an example which had the potential to affect overall perception of justice in the society. For more on Mečiar's amnesties, which were eventually scrapped by the parliament in 2017, see for instance Michal Ovádek, *„Unrichtiges Recht" in Slovakia? The Radbruch Formula and Positive Law from the Nineties*, VerfBlog, February 7, 2017. Available at http://verfassungsblog.de/unrichtiges-recht-in-slovakia-the-radbruch-formula-and-positive-law-from-the-nineties/

Figure 3: Public Distrust in Courts in Slovakia, 1997-2016 (in %)[92]

It can be assumed that the main cause of public distrust lies in the perceived lack of independence of courts and judges: only one-fifth of Slovak citizens consider the independence of the judiciary as very or fairly good,[93] which is the lowest share in the EU. Respondents predominantly stated that interference and pressure from the government and politicians was the main reason for their mistrust. Other factors potentially lowering the level of public confidence are widespread nepotism among the judges,[94] perceived excessive length of proceedings,[95] perceived corruption in the judiciary and prosecution,[96]

[92] Source: Via Iuris, Focus 2015 (Via Iuris, Focus. *Vývoj nedôvery v súdy a súdnictvo, roky 1997-2015.* https://www.aktuality.sk/foto/305603/5/tri-stvrtiny-slovakov-nedoveruju-sudom-a-dovera-sudnictva-stale-klesa/); Via Iuris 2016 (Via Iuris. *Správa z prieskumu verejnej mienky o dôvere verejnosti k súdom.* http://www.viaiuris.sk/wp-content/uploads/2016/10/Spr%C3%A1va-z-prieskumu-d%C3%B4vera-verejnosti-vo%C4%8Di-s%C3%BAdom-2016.pdf). The question asked was: "To what extent do you trust or distrust the courts and the judiciary?" Possible answers: I definitely trust/I rather trust/I rather distrust/I definitely distrust them. Legend: The data in the figure represent the share of respondents who rather + definitely distrust the courts and the judiciary.

[93] The 2016 EU Justice Scoreboard.

[94] According to Transparency International Slovakia, every fifth judge has a close family relationship to another judge or other court employee. See Šipoš, Spáč & Klátik, *supra* note 47.

[95] Eurobarometer, supra note 90. According to the 2016 EU Justice Scoreboard, the estimated time needed to resolve a case in court (meaning the time taken by the court to reach an initial decision) was 238 days in Slovakia, only slightly above the average of 225 days calculated for 21 EU countries.

[96] FOCUS. *Percepcia korupcie na Slovensku. Prieskum verejnej mienky pre Transparency International Slovensko* (2015). Available at: http://www.transparency.sk/wp-content/uploads/2015/05/FOCUS-Percepcia-korupcie-na-Slovensku-feb.2015.pdf

perceived lack of fairness of judgements,[97] and perceived low intelligibility of judicial decisions.[98] From this perspective, it must be concluded that a strong JSG has been unable to significantly improve the performance of the Slovak judiciary, or at least its public image. On the other hand, the credibility of courts and judges has been further damaged by their numerous scandals and affairs,[99] often involving those in top positions, most prominently the previously-mentioned Štefan Harabin.[100]

Thus, to put it bluntly, Slovakia can serve as definite proof that the mere transfer of power into the hands of judges (e.g. via the establishment of a judicial council) does not automatically lead to higher public confidence in courts and the judiciary. On the contrary, when the judiciary is represented and governed by judges who do not inspire trust, and when these top representatives instead cause scandals and affairs rather than help to set them right, the strong model of JSG can lead to the corrosion of public confidence in the judiciary.

III. Transparency of the Slovak Judiciary

The low level of public confidence accompanied by problems such as perceived corruption and nepotism were the main reasons why the 2011 reform saw a considerable increase in transparency of the judicial system and the processes related to judges and their professional careers.[101] Prior to this, a major improvement in transparency of the Slovak judiciary emerged with the establishment of the JCSR. Since 2003, the JCSR has published documents regarding its operation on its website, however for years this has only included the publication of resolutions adopted by the JCSR, without any information about its meetings. Also, the JCSR has, practically since its establishment, published anonymized decisions of disciplinary senates on its website.

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[97] Eurobarometer, *supra* note 90.

[98] Eurobarometer, *supra* note 90.

[99] E.g. in the so-called Bonanno affair, four judges of the Supreme Court sued the tabloid Nový Čas for publishing pictures from their private party held in 2011. The pictures captured their host welcoming them with a submachine gun and blue ear-protectors, imitating the mass murderer who shot dead seven persons in Bratislava two months earlier. In 2017, the Constitutional Court overturned the decisions of district and regional courts and stated that the daily does not need to apologize nor pay any compensation.

[100] See Section B.II.2. For instance, the media published the transcripts of Harabin´s intimate 1994 conversation with an Albanian drug mafia boss, and a former attorney general indirectly confirmed its authenticity (Harabin later sue him for doing so). Among other scandals, he repeatedly publicly insulted other judges or members of Judicial Councils (e.g. calling them "juristutes"), and has several times been accused of bullying judges and attempting to influence their verdicts. See, e.g. Martin M. ŠIMEČKA, *The Crooked Judges of Slovakia*. RESPEKT, November 20, 2012. Available at: https://www.respekt.cz/respekt-in-english/the-crooked-judges-of-slovakia.

[101] For a more detailed discussion of changes see SPÁČ, ŠIMALČÍK & ŠÍPOŠ, *supra* note 69.

Since this reform, the JCSR publishes minutes from each meeting together with their audio recordings. Before any meeting, all discussed documents need to be published as well. The JCSR is also responsible for publishing the asset disclosures of all judges, which includes a list of a judge's family members working in the judicial system or in organizations in the Ministry's portfolio, e.g. state penitentiaries.

In addition, since the reform, courts are obliged to publish all their final decisions online within 15 days after they come into force. Similarly, courts publish information about all scheduled hearings, including dates, times, as well as the names of parties in criminal and administrative cases.[102] Furthermore, as regards the day-to-day operations of the courts, each court is obliged to publish its work schedules and all of their amendments.[103] All this information is published on the Ministry's website; the only exception is the Supreme Court, which publishes its decisions separately on its own website. Courts are also obliged to publish two types of information about individual judges or candidates for judicial positions. First, 'annual statistical reports' include descriptive information about the performance of each judge, such as the number of assigned and resolved cases in a given period, as well as information about a judge's docket, or how a higher court had decided on appeals to their decisions. From a transparency perspective it needs to be stressed that they are difficult to understand and are not necessarily helpful, either for better understanding the system or in holding it accountable.[104] Courts are also obliged to publish detailed information about selection procedures for all judicial positions including the résumés of all candidates, their motivation letters, candidates' disclosures about family ties in the judiciary, as well as detailed reports from these procedures.[105]

All in all, the effects of establishing a strong JSG in Slovakia are rather mixed. On one hand, the legal legitimacy of the judicial system is secured by the entrenchment of all institutions playing a role in administration, either in the Constitution or in laws, while its normative content is protected by the Constitutional Court. Rather recently, this problem has also been addressed by a considerable increase in the transparency of the system, however its effect cannot be assessed with confidence at this point.

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[102] This fact effectively de-anonymizes decisions, which themselves are made anonymous. It possibly raises a concern about the conflict between transparency and protection of privacy.

[103] Work schedules contain information about the composition of senates, rules of case assignment or time-slots allocated for the hearings of each judge.

[104] So far, there has only been one attempt to make sense of this data. See: Samuel Spáč, *Judging the Judges: Measuring Performance of District Court Judges in Slovakia* (2015) (unpublished manuscript, available at: https://www.researchgate.net/publication/285589433_Judging_the_Judges_Measuring_Performance_of_District_Court_Judges_in_Slovakia).

[105] For more see Spáč, *supra* note 71, at 90-125.

D. Discussion: Slovak Judicial Administration in the Context of Separation of Powers Theories

I. Repercussions of Judicial Self-Government for the Principle of Separation of Powers

Despite expectations that the establishment of judicial councils should help insulate the judiciary from undue influence, the previous sections showed that there are limits to such assumptions. On one hand it is true that a greater level of JSG helped to insulate the judiciary from direct political pressure. On the other hand, it allowed for an unexpected capture of the judiciary 'from inside' through rewarding the allies of those in power and punishing their critics. These repercussions point at the drawbacks and limits inherently tied with the establishment of strong judicial councils in post-authoritarian, transitioning countries.

The mere idea of introducing the JCSR in 2002 was to shift the creative power from the executive to an autonomous body, the JCSR, which newly gained wide discretion and competence to decide on the appointment of new judges, promotion of judges, appointments of disciplinary senates, etc.[106] The JCSR, an independent body widely recommended by international bodies and observers, was believed to help insulate the Slovak judiciary from undue political pressure. The main legislative amendments, targeting the division of competences between the Minister of Justice, court presidents, and the JCSR, therefore directly addressed the 'checks and balances' aspect of the separation of powers principle,[107] while other elements of the division of powers principle, such as the separation of institutions, separation of functions, and personal incompatibility did not really come into play.[108] Similarly, the question of democratic deficit was never raised in the discussion. It seems that Slovak stakeholders perceived the establishment of a judicial council as a panacea for the mishaps of the previous Mečiar government in the judiciary and one of the leverages that would help the country achieve an ideal, western type, democratic political system. Hence the recommendations of the European Commission, which strongly suggested that Slovakia should establish a judicial council, did not raise questions of whether this institution suited the political and judicial environment or what impact would it have.

Strikingly, while the Slovak political system completely ignores the problem of "travelling institutionaries", a phenomena strongly present in the Slovak political culture and judiciary, it almost obsessively adheres to checks and balances. Between two terms in the

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[106] For more detail, see Section B.II.

[107] See Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 *BOSTON COLLEGE L.R.* 433 (2013), at 433; and Christoph Möllers, THE THREE BRANCHES: A COMPARATIVE MODEL SEPARATION OF POWERS (2013).

[108] See Waldron, *supra* note 106; or Möllers, *supra* note 107.

office of Chief Justice of the Supreme Court and the President of the JCSR, Štefan Harabin managed to serve for three years as Minister of Justice, effectively moving from one branch to another and back. Additionally, he was not the only judge who eventually returned to the judiciary who also served as the Minister of Justice. The same applies to Harabin's successor Viera Petríková, who moved from a small district court to the governmental position only to be later promoted to the Supreme Court. Further, there were two judges who have served as Deputy Ministers without ever resigning from their judicial office. Daniel Hudák was Deputy Minister during Harabin's and Petríková's terms between 2006 and 2010, and after that moved back to the judiciary. Monika Jakovská has served under two Ministers since 2012 until the present day, and is still officially listed as a judge. Jankovská was even included on the party list of SMER-SD in the 2016 parliamentary elections, and Supreme Court Judge Peter Paluda ran for office in the 2012 parliamentary elections.

On the contrary, the process of selecting judges perfectly illustrates an almost comical obsession with checks and balances. As many as four different bodies are involved in the process of appointment to a judicial office. First, a selection committee consisting of both judicial and political nominees tests a candidate's competence to perform in the judiciary. Second, the National Security Agency[109] vets the candidate's background and ability to act independently and impartially. Third, the JCSR, also a body with representatives of both the judiciary and political branches, decides on nomination for the appointment. And finally, a candidate assumes the office only after appointment by the president.

It is however worth noting the historical and socio-cultural background under which the checks and balances principle represent an integral and important part of Slovakia's early political development. The power struggle between Mečiar and his political opponents in the early transitioning era of 1993-1998 represented a core of the Slovak Constitutional Court's case law even prior to the introduction of the JCSR. The Slovak Constitutional Court, under the gradual shift to semi-authoritarianism, was typically petitioned with cases regarding (1) interference with the independence of the NCSR (attempts to remove unwanted designated deputies from their offices),[110] and (2) disputes and conflicts between the President and PM Mečiar regarding the continual interference of the government in what should have been presidential competences. It is worth noting that in the 1994-1998 electoral term, the Slovak Constitutional Court typically acted as the President's ally, while President Kováč often used the Constitutional Court as leverage

[109] The requirement that the Agency provides security clearances of all new judges was introduced in the Constitutional amendment in 2014 in Art. 154d of the Slovak Constitution. For more see Erik Láštic and Samuel Spáč, *Slovakia / Slovaquie* 26 EUROPEAN REVIEW OF PUBLIC LAW 1209 (2014).

[110] See Slovak Constitutional Court, judgement of June 2, 1993, I. ÚS 39/93; or Slovak Constitutional Court, judgement of November 29, 1995, PL. ÚS 29/95; or Slovak Constitutional Court, judgement of July 11, 1996, I. ÚS 7/96.

against Mečiar. The atmosphere of constant power struggles, lack of clear institutional boundaries, and strong anti-Mečiar sentiments created a pressing need to anchor constitutional institutions, set the boundaries of their power, and secure an independent judiciary. Some competence disputes continued to appear before the Constitutional Court as late as in the 2010s, especially during government attempts to remove some Judicial Council members with close ties to Mečiar's regime from office.[111] Another huge cluster of cases regarded the refusal of President Gašparovič to nominate new Constitutional Court judges, although they had already been approved by the parliament.[112]

II. JCSR and the Politicization of the Slovak Judiciary

While the Constitutional Court represented an influential actor in the separation of powers (mostly checks and balances) principle and policies, the introduction of the JCSR paradoxically reduced its influence. As a body established by the Constitution, the Constitutional Court had to treat it as a constitutional authority, and therefore with much more constraint when it came to the review of JCSR's actions.

When we attempt to answer the question whether the JCSR itself managed to depoliticize the Slovak judiciary, the results are, at best, dubious. It is however crucial to understand the broader political context and atmosphere in which the JCSR was operating. First, the standing judges and especially the incumbent Chief Justice of the Supreme Court, Harabin, allied with Mečiar, stretched and complicated the process of establishing the JCSR as much as possible. Second, the period of calm under the new chairmanship of Milan Karabín in 2003 was short lived. The parliamentary elections of 2006 returned Mečiar to the governing coalition, whose Prime Minister Fico allowed Harabin to become the Minister of Justice. At this point, Harabin changed his strategy of being critical of the JCSR and started preparing the ground to cement his own influence in the judiciary by entering the JCSR as its president. As the Minister of Justice, Harabin therefore supported the wide discretion and broadening of the JCSR's competences. This idea was initially supported by Fico's government, which was a strong proponent of JSG. Harabin was able to hand-pick JCSR members both for the government and legislature, maintained sufficient support among judges thanks to his carrots and sticks policy (rewarding allies and punishing critics), orchestrated his own comeback and appointment as the future Chief Justice of the Supreme Court, and hence, as the JCSR chairman. Harabin's initial popularity was built on strong ties among judges in Eastern Slovakia and, paradoxically, a rhetoric of an independent judiciary in which judges know best how to govern and regulate the system.

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[111] Especially the removal of Harabin from the presidential post in the JCSR. See Slovak Constitutional Court, resolution of February, 17 2011, IV. ÚS 46/2011.

[112] Ref. Here, SCC was heavily inspired by the case law of the Czech Constitutional Court, to the extent that the Chief Justice informally approached the CCC asking for a solution which CCC had implemented in past, when faced with President Klaus's refusal of to nominate new judges.

The political salience of the topic and the level of governmental inference, nevertheless, did not cease completely after the change of government in the 2010 election. On the contrary, the new Minister of Justice, Žitňanská, entered into an open war with Harabin over a series of attempted reforms, and the new SMER government continued in these efforts during 2012-2016. Interestingly, Harabin was eventually becoming more and more toxic and finally, the entire political sphere stood united in the view that Harabin should be removed. This happened in 2014, when the JCSR elected a new Chief Justice of the Supreme Court as well as President of the JCSR.

E. Conclusion: JCSR and the Position of the Slovak Judiciary within the Political System

As shown in the previous sections, Slovakia, in the atmosphere of post-Mečiar optimistic Europeanization and under the political pressure of the European Commission and the Council of Europe, adopted the recommended model of judicial council with the predominant influence of judges. The introduction of the judicial council significantly shifted the picture and the competences of bodies (and the representation of other branches of power) on the JSG, with the JCSR clearly being the most powerful and influential actor. Compared with pre-2002, the influence of other branches of power was significantly diminished, especially for the parliament. Although the court presidents still hold strong competences, they rarely act on them.

This article demonstrated that the influence of such a strong model of judicial council and the separation of the judiciary from the influence of other political branches is not clear cut. The article aimed to address both structural changes in judicial self-governance and their relationship to five core values inherent to the judiciary: independence, accountability, legitimacy, transparency, and public confidence and the trust in courts. Based on an in-depth analysis, we can conclude that the association between the establishment of the JCSR and potential improvement in these values is, at best, dubious. While formally, several mechanisms and competences fostering the independence and accountability of judiciary were introduced, their effect was diminished by continuing political struggles surrounding the JCSR. Moreover, the Constitutional Court often a played much more important role in protecting these principles than the JCSR itself. The overall level of distrust in the courts rose significantly between 1997 and 2002, and has remained very high until now. The introduction of the JCSR has not helped to lessen it.

Finally, the effect of the JSCR on the position of the Slovak judiciary within the separation of powers principle was twofold. First, the wide discretion and most of the JSG competences were vested in the JCSR, which is, for the most part, truly independent of the government and the Ministry of Justice. Judges have particularly strong influence over selection, promotion, and disciplinary procedures. Moreover, the JCSR is more or less controlled by judges, with most of its members hand-picked in the last appointment round

by the Association of Judges of Slovakia. With the help of politicians, the JCSR was hijacked by judges who used their powers to capture the judiciary from inside, and they have used their powers in such a manner that helps them to protect their interests.

Articles

Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain

Aida Torres Pérez[*]

Abstract

The General Council of the Judiciary is the main institution of judicial self-government in Spain. It was established to ensure the external independence of the judiciary, and in particular the independence of the judiciary vis-à-vis the executive branch of government. To what extent does the Judicial Council manage to fulfill its goal? First, the evolution of the Judicial Council will be presented in order to understand the principal reforms and reasons behind its creation. Next, the impact of the Judicial Council upon judicial independence, as well as accountability, transparency, and public confidence will be critically examined in order to assess its contribution to judicial legitimacy. In the end, it will be argued that the politicization of the Judicial Council has hindered it from protecting judicial independence from partisan interests, and has contributed to undermining public confidence in the judiciary.

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A. Introduction

The General Council of the Judiciary (hereinafter referred to as the Judicial Council) is the main institution of judicial self-government in Spain. It was established by the 1978 Spanish Constitution,[1] enacted in the return to democracy after Franco's dictatorship. The Judicial Council was introduced following the model of the *Consiglio Superiore della Magistratura* in Italy, and the *Conseil Superieur de la Magistrature* in France, for there was no precedent in the Spanish constitutional history.[2] The Judicial Council is defined as a constitutional body of judicial self-government, yet it does not form part of the judiciary. Its main goal is to ensure the external independence of the judiciary, and in particular the independence of the judiciary vis-à-vis the executive branch of government. The question researched in this work is the extent to which the Judicial Council manages to fulfill its goal.

Judicial independence is the guiding constitutional principle behind the design of the judiciary. Indeed, the notion that courts must be free from external pressure lies at the core of the justification of the power to adjudicate that is accorded courts and distinguishes them from the power exercised by other public authorities such as the legislative or the executive powers.[3] Notwithstanding, other values, such as accountability and transparency, are extremely important for judicial legitimacy. Independence is thus regarded as a necessary, but not sufficient, condition for the legitimacy of courts.

This analysis aims to assess the Judicial Council's contribution or lack thereof in promoting these values. It will be argued that the politicization of the Judicial Council has hindered it from securing judicial independence from partisan interests. The 2017 EU Justice Scoreboard[4] shows that the perceived independence of Spanish courts and judges by the general public is among the lowest in the EU (just above Slovakia and Bulgaria). The main reason stated for this negative perception is interference or pressure from government and politicians. Indeed, the public's perception that the Council is highly politicized has

[1]Constitution Article 122.

[2]MANUEL JOSE TEROL BECERRA, EL CONSEJO GENERAL DEL PODER JUDICIAL 53–61 (1990); Luis Aguiar de Luque, *Continuidad y reforma en el régimen jurídico del Consejo General del Poder Judicial,* in INDEPENDENCIA JUDICIAL Y ESTADO CONSTITUCIONAL. EL GOBIERNO JUDICIAL 11–12 (Luis Aguiar de Luque ed., 2016).

[3] Aida Torres Pérez, *From Judicial Independence to Interdependence in the International Sphere,* 24(4) MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 462, 464 (2017).

[4]European Commission, *The 2017 EU Justice Scoreboard*, at 37–38, http://europa.eu/rapid/press-release_IP-17-890_es.htm

profoundly damaged its sociological legitimacy, and hence that of the judiciary as a whole. The Judicial Council has been politically captured to the point of dysfunction.[5]

In what follows, the creation and evolution of the Judicial Council will first be presented to understand the principal changes and reasons behind them. Second, the impact of the Judicial Council upon judicial independence, as well as accountability, transparency, and public confidence will be critically examined in order to assess its contribution to judicial legitimacy. Finally, we will conclude with reflections on the Judicial Council from the perspective of the separation of powers.

B. The General Council of the Judiciary: the rationale for its creation and evolution over time

Following Franco's dictatorship, ensuring external judicial independence became the main rationale for the creation of a Judicial Council. External judicial independence requires that judges be free from any interferences or influences coming from other public powers and private actors, whereas internal independence refers to the potential influences coming from other judges or courts. The principal concern was minimizing the potential for interference and pressures upon judges and courts from the executive power, as confirmed by the constitutional debates.[6] Hence, the Judicial Council was created to transfer functions that might compromise judicial independence, such as the appointment, promotion, or discipline of judges, from the executive to an independent body.

Over the drafting process of the Constitution, there were several proposals to include further provisions about the basic principles of the Council, a broader definition of its functions, or the regime of incompatibilities of its members. And yet, the framers opted for a minimal constitutional regulation and the referral to an Organic Law[7] as the instrument to develop the composition and functions of this institution, following the French and the Italian model.[8]

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[5]Aguiar de Luque, *supra* note 2; Diego Íñiguez Hernández, *La reforma del Consejo General del Poder Judicial en España. Noticia de otra reforma fallida*, 7 CUADERNOS MANUEL GIMÉNEZ ABAD 147 (2014).

[6] Terol Becerra, *supra* note 2, at 53; VÍCTOR FERRERES COMELLA, THE CONSTITUTION OF SPAIN 210 (2013).

[7]The Organic Law is a specific type of legislation that needs the support of an absolute majority of Congress to be enacted.

[8] Terol Becerra, *supra* note 2, at 58–59.

The judiciary is also governed, subordinate to the Judicial Council, by the "Administrative Chambers" (*Salas de Gobierno*) of the Supreme Court, the National Audience[9] and the High Courts of Justice, as well as the Presidents of each court. The Administrative Chambers exercise managerial and organizational functions and are vested with disciplinary powers. Although the exercise of these functions could well be examined from the perspective of internal judicial independence, this analysis will focus on the risks for external judicial independence.[10]

The Judicial Council was first regulated by Organic Law 1/1980, of 10 January 1980, on the General Council of the Judiciary. Soon thereafter, following the victory of the Socialist Party in the general elections, this Organic Law was derogated and the regulation of the Judicial Council was reorganized and established by Organic Law 6/1985, 1 July, on the Judicial Power (LOPJ). The legislative regulation of the Council has continued to evolve over time with significant changes being introduced in 1994,[11] 2001,[12]and 2013.[13]Further reforms were enacted in 2014 and 2015.[14] We will now examine the main changes and the reasons behind them in, first, the composition of the Council and appointment of its members and, second, the powers this institution holds.

I. Composition and appointment

According to Article 122(3) of the Constitution, the Judicial Council includes the President of the Spanish Supreme Court and twenty other members. The other members are a combination of mostly judges and some other jurists: twelve members are appointed among judges while eight are selected among jurists whose competence is recognized and possess more than fifteen years of professional experience. Council members are appointed for a non-renewable period of five years. The Council is presided by the President of the Supreme Court, who is elected by the Council members.

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[9]The "Audiencia Nacional" is a court with jurisdiction over the whole country specialized on certain subject matters, such as terrorism.

[10] Rafael Bustos Gisbert, *Encuesta sobre la Independencia del Poder Judicial,* 38 TEORÍA Y REALIDAD CONSTITUCIONAL 15, 18–19 (2016) claimed that this form of internal independence has not raised serious problems.

[11]Organic Law 16/1994, 8 November, on the amendment of Organic Law 6/1985 on the Judicial Power.

[12]Organic Law 2/2001, 28 June, on the composition of the General Council of the Judiciary.

[13]Organic Law 4/2013, 24 June, on the amendment of the General Council of the Judiciary.

[14] Organic Law 4/2014, 11 July; and Organic Law 7/2015, 21 July.

The appointment process has undergone significant changes over time and represents one of the most sensitive, contested issues regarding the institutional design of the Judicial Council.[15] According to the Constitution, the eight jurists are to be elected by the Congress (four) and the Senate (four), by a three-fifths majority of each Chamber.[16] The constitutional text is vague, however, regarding the appointment of the twelve judicial members; it does not specify who shall appoint them, referring only to the terms set by the Organic Law.

Initially, Organic Law 1/1980 provided that the twelve judges would be elected by judges, but this model did not last long. In 1985, the Organic Law passed after the Socialists were elected stipulated that the twelve judges were to be appointed by Congress and Senate (six by each chamber). The political motivation for this amendment was the dominance of a single conservative judicial association in the election of the first twelve judicial Council members.[17] In response, the Socialist government, which gained a majority in Congress in the 1982 elections, launched a reform of the selection process for the Council members that transferred appointment power to the Parliament.

This reform was challenged and went to the Constitutional Court.[18] The Court upheld the constitutionality of the new law on the grounds that the Constitution did not specify how the twelve judicial members would be appointed. At the same time, however, the Constitutional Court voiced some concern regarding the shift of power to the legislature, noting that the Constitution stated that eight members of the Judicial Council were to be elected by Parliament. Had the will of the framers been that Parliament elected all twenty regular members, this power would have been directly attributed to Parliament. The Constitutional Court also warned against the risk of subjecting the appointment process to partisan politics in the long run.[19]

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[15] Manuel Gerpe Landín & Miguel Ángel Cabellos Espiérrez, *La Reforma Permanente: El Consejo General del Poder Judicial a la Búsqueda de un Modelo*, 103 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 13 (2015); Ascensión Elvira Perales, *Composición y Elección de los Miembros del Consejo General del PoderJudicial*, in INDEPENDENCIA JUDICIAL Y ESTADO CONSTITUCIONAL. EL GOBIERNO JUDICIAL 27, 28–36 (Luis Aguiar de Luque ed., 2016).

[16] The Spanish Parliament is composed of two Chambers: the Congress of Deputies, which represents the people; and the Senate, which is defined as the Chamber of territorial representation.

[17] *Asociación Profesional de la Magistratura (APM)*. Rosario Serra Cristóbal, *La Elección de los Miembros del Consejo General del Poder Judicial. Una Propuesta de Consejo más Integrador e Independiente,* 31 TEORÍA Y REALIDAD CONSTITUCIONAL 277, 301 (2013); Íñiguez Hernández, *supra* note 5, at 148.

[18] STC 108/1986, 29 July 1986.

[19] *Id.* para. 13.

In 1996 the Popular Party won the general elections, and in 2000 it obtained absolute majority in Congress. A new mixed appointment process was enacted in 2001, according to which the twelve judges would be elected by Parliament from a pool of at most thirty-six candidates nominated by judicial associations or cohorts of judges that represented at least 2% of the total number of judges in active service.[20] The selection of the thirty-six candidates was to be determined by the number of members of each judicial association and the number of non-affiliated judges. This mixed model therefore granted judges the power to nominate candidates and reserved the final decision for Parliament.

This amendment attributed a prominent role to the judicial associations in the appointment process, mirroring the actual practice, since judicial associations already placed a central role in selecting the candidates. According to the data provided by the Council,[21] between 2004 and 2017 the percentage of associated judges has slightly varied between 53% and 55%.[22] The most influential judicial associations are: Professional Association of the Magistrature (*Asociación Profesional de la Magistratura, APM*) and Judges for Democracy (*Jueces y Juezas para la Democracia, JJpD*). The former is regarded as conservative, and ideologically close to the Popular Party and the latter as progressive and close to the Socialist Party.[23]

The configuration of the Council selected in 2001 reveals their importance. Although associated judges make up about half of the total, nine out of twelve of the elected members belonged to a judicial association. In the subsequent term, in 2008, all the elected candidates did.[24]

In addition, the requirement of a three-fifths majority in Congress and the Senate to elect all Council members, rather than promoting broad consensus within Parliament, has led to the practice of allocating the positions to the two main political parties. Usually, the Socialist and the Popular Party have distributed the twenty candidates between them, with occasional inclusion of members from a few smaller political groups, depending on their

[20] Article 112 LOPJ.

[21] http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Plan-Nacional-de-Estadistica-Judicial/Recursos-humanos/Asociaciones-Judiciales-Profesionales

[22] In 2017, out of a total of 5.364 judges in active service, 2.977 belonged to judicial associations.

[23] In 2017, *APM* had 1.328 members, and *JJpD* 523. There are two other important judicial associations in terms of their membership: *Asociación Francisco de Vitoria* (797) and *Foro Judicial Independiente* (324).

[24] Six belonged to *Asociación Profesional de la Magistratura;* five (and the President) to *Jueces y Juezas para la Democracia,* and one to the *Asociación de Jueces Francisco de Vitoria*, see Serra Cristóbal, *supra* note 17, at 303.

respective strength in the Congress and the Senate. Despite this informal arrangement, it is not always easy for the parties to reach agreement.

For instance, in 2008 the Council was only renewed after a year and a half delay of shameful political scuffling between the main parties over control of the Council. In the end, the Socialist Party nominated 9 members, as did the Popular Party, while the Basque Nationalist Party and *Convergènca i Unió* (the former nationalist Catalan party) advanced one member each. Moreover, even though the choice of the President of the Council and the Supreme Court corresponds to the Council, in practice this tends to be determined through political negotiation. For instance, in 2008, the newspapers reported that President Rodríguez Zapatero had proposed Carlos Dívar as President of the Council, and that Mariano Rajoy, the opposition leader at the time, had accepted.[25]

As a consequence, the Council is perceived as politicized, hence undermining its legitimacy, and the perceived lack of legitimacy pervades the judiciary. This situation has led to political debate over reforming the appointment process of Council members. In 2011, the Popular Party defeated the Socialist in the general elections and obtained absolute majority in Congress. The new government presided by Mariano Rajoy launched a reform of the Judicial Council by appointing an institutional commission of experts to draft a proposal. Among the novelties they proposed, it was suggested that the twelve judicial members be elected by their peers, to improve the proportionality of the election system and reduce the dominance of judicial associations.[26]

Notwithstanding, Organic Law 4/2013, enacted without any opposition support, did not follow the institutional Commission proposal, reserving the election of the judicial members for Parliament. The role of judicial associations was slightly revised, but remained very much present in practice. Indeed, current Article 567(2) LOPJ sets forth: "Each Chamber shall elect, by a majority of three fifths of its members, ten members, four among jurists of recognized competence with more than fifteen years of professional experience, and six judges, according to Chapter II of the Present Title."

Article 572 LOPJ and the following clauses regulate the process through which judges may submit their candidature. To be eligible for candidacy, judges must provide the support of at least twenty-five members of the judicial profession in active service, or the support of a judicial association legally constituted. Hence, in order to promote the participation of judges from across the judicial spectrum, the number of backers was reduced and

[25] http://www.rtve.es/noticias/20080922/psoe-propone-carlos-divar-como-presidente-del-cgpj-fernando-rosa-como-vicepresidente/161666.shtml; http://www.lavanguardia.com/politica/20080922/53544647489/zapatero-propone-a-carlos-divar-como-presidente-del-cgpj-y-del-tribunal-supremo.html

[26] Elvira Perales, *supra* note 15, at 31–32.

associations may now support candidates, instead of directly submitting them.[27] *De iure*, the election is in the control of Parliament while, *de facto,* judicial associations play still an important role. This model has been contested because of both its questionable compatibility with the constitution and the consequences for the Council's institutional independence, which will be discussed in section C.

II. The constitutional functions of the Judicial Council

The Constitution directly attributes a set of powers to the Judicial Council: appointing, promoting, inspecting, and disciplining judges.[28] These functions are all very sensitive from the perspective of judicial independence, and for this reason they were removed from the executive and allocated to the newly created Judicial Council.[29] Indeed, the powers attributed to the Council would otherwise be exercised by the Ministry of Justice. Moreover, the Constitution grants the Judicial Council the nomination of two candidates to the Constitutional Court[30] and the right to be heard before the General Prosecutor is appointed.[31]

1. Judicial appointments and promotion

Entry level judicial appointments are made based on merit. The selection process consists of a set of competitive exams followed by a6-month course on practice and theory at the Judicial Academy, and then a training period in court. The Judicial Council oversees the Judicial Academy. There is longstanding debate over the need to reform the model of judicial selection, since the exams focus on the candidates' faculty of memory more than the intellectual, analytical, and argumentative skills also needed to exercise the judicial function. Notwithstanding the debate, the model has changed very little over time. Whereas the process of judicial appointment has evolved in other countries, it has grown obsolete in Spain in the face of the transformations and complexity of current society and is now ill-designed to select the candidates that might best perform the judicial function.[32]

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[27] Gerpe Landín & Cabellos Espiérrez, *supra* note 15.

[28] Constitution Article 122(2).

[29] Ferreres Comella, *supra* note 6, at 211.

[30] Constitution Article 159(1).

[31] Constitution Article 124(4).

[32] ALEJANDRO SAIZ ARNAIZ, LA REFORMA DEL ACCESO A LA CARRERA JUDICIAL EN ESPAÑA: ALGUNAS PROPUESTAS (2007); Pascual Ortuño Muñoz, *El Acceso a la Judicatura,* in INDEPENDENCIA JUDICIAL Y ESTADO CONSTITUCIONAL. EL ESTATUTO DE LOS JUECES (Maribel González Pascual & Joan Solanes Mullor eds., 2016).

The Judicial Council is also in charge of promoting judges over their careers. The general criteria involve the principles of merit and capacity. The legislative framework, however, leaves considerable margin for discretion to the Judicial Council in appointing judges to high courts and administrative positions. No such discretion exists at the lower court level, where appointments and promotion are determined by law and seniority is the main element. At higher levels, though, appointments are largely discretionary, as long as the candidates fulfill certain requirements.[33] Discretionary appointments include: the president, presidents of chambers, and judges of the Supreme Court; the president of the National Audience and its chambers; the presidents of High Courts of Justice and their chambers; and the presidents of Provincial Courts. Some of those positions are purely jurisdictional, while others involve managerial and organizational responsibilities.

The appointment power lies with the Plenary of the Judicial Council and there is significant risk that in practice the selection of candidates for these positions be determined by ideological allegiance.[34] The wide margin for discretion leaves too much room for arbitrary decisions based on political views.[35] Some legislative amendments have been enacted to address this risk: Organic Law 19/2003, 23 December, emphasized the principles of merit and capacity as the main elements for consideration in appointment and promotion decisions; and Organic Law 2/2004, 28 December, raised the number of votes to a three-fifths majority for the appointment of Supreme Court judges and presidents of chambers, as well as presidents of High Courts to encourage the search of broad consensus within the Council. The 2013 reform of the LOPJ, however, replaced the qualified majority with a simple majority for the appointment of high judicial positions. The alleged purpose of this reform was to simplify Council operations, but in practice its consequence has been determining appointments and promotion without need to reach agreement with the minority within the Council.[36]

2. Inspection and disciplinary regime

The Judicial Council performs the function of monitoring all courts to supervise the administration of justice.[37] Monitoring functions are also attributed to the Presidents of

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[33]Itziar Gómez Fernández, *Nombrar como Manifestación del Poder del Consejo: Discrecionalidad e Independencia del Juez,* in INDEPENDENCIA JUDICIAL Y ESTADO CONSTITUCIONAL. EL GOBIERNO JUDICIAL 69 (Luis Aguiar de Luque ed., 2016).

[34] Íñiguez Hernández, *supra* note 5.

[35]See the discussion undersection C.I.3 below.

[36]Diego Íñiguez Hernández, *La Contrarreforma del Consejo General del Poder Judicial,* 34 TEORÍA Y REALIDAD CONSTITUCIONAL 333, 340–341 (2014).

[37]JOHN BELL, JUDICIARIES WITHIN EUROPE. A COMPARATIVE REVIEW 184–186 (2006).

the Supreme Court, the National Audience, and the High Courts of Justice.[38] The inspections focus on aspects such as the number of cases decided and pending and the duration of proceedings.

The disciplinary power corresponds to the Judicial Council. The Administrative chambers and court presidents are also granted disciplinary power for minor offenses.[39] Organic Law 4/2013 modified the disciplinary procedures.[40] The new system is aimed at strengthening the separation between the investigation and the decision phases preceding sanctions and furthering the guarantees of the administrative proceedings based on the accusatory principle.

In this vein, Organic Law 4/2013 created a new body, the "prosecutor of the disciplinary action" (*Promotor de la Acción Disciplinaria)* and amended the Disciplinary Commission. The Prosecutor, who is appointed by the Plenary among the magistrates of the Supreme Court and those with more than twenty-five years in the judicial career, is in charge of assembling the facts for disciplinary proceedings.[41] The Disciplinary Commission is composed of seven members elected by the Plenary among its own members (four judges and three jurists).[42] Accordingly, the different functions of instruction and sanction are delegated to different bodies.

C. The Impact of the Judicial Council on the independence, accountability, transparency, and public confidence in the judiciary

The normative legitimacy of courts as institutions vested with the power of adjudication is heavily grounded on their independence, which demands that the judges who apply the law to the disputes brought before them be free from undue pressures or influences from external actors. At the same time, their legitimacy might also be contingent on other values, such as accountability or transparency.

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[38]Articles 171–172 LOPJ.

[39]Articles 414–427 LOPJ.

[40]Gema Rosado Iglesias & Ana Espinosa Díaz, *Independencia Judicial y Poder Disciplinario,* in INDEPENDENCIA JUDICIAL Y ESTADO CONSTITUCIONAL. EL GOBIERNO JUDICIAL 101, 110–114 (Luis Aguiar de Luque ed., 2016).

[41]Article 606 LOPJ.

[42]Article 603 LOPJ.

Subjecting judges to accountability mechanisms, however, could also pose a threat to judicial independence.[43] Those who have the power to hold judges accountable might use the power to influence or interfere with the judicial function.[44] And yet, the notion of independence does not involve being free from any constraint, but only from those constraints that might distort the decision-making process by including considerations extraneous to adjudication, such as political allegiances or personal gain. Judicial independence does not run counter to all forms of accountability, as long as the constraints imposed do not open a path to "undue" influence or pressure.[45] In addition, transparency has gained momentum as a value associated with good governance and democratic legitimacy, and in the judicial realm it might actually contribute to enhancing both independence and accountability.

We are not only interested in the normative legitimacy of courts, but also in their sociological legitimacy.[46] In a descriptive or sociological sense, following Weber, legitimacy implies that a legal system or institution is perceived as legitimately binding by those under its jurisdiction, and thus making a justified claim to obedience. In this sense, legitimacy refers to actual the beliefs held by individuals.[47]Courts not only need to be independent, but also be perceived as independent in order to gain support from key constituencies. Hence, this section will analyze the impact of the Judicial Council upon the independence, accountability, transparency, and public confidence in the judiciary.

I. The Judicial Council and judicial independence

The main rationale behind the Judicial Council is secure the independence of the judiciary from external influence, and in particular that of the executive power. To what extent does the Council fulfill this goal? The mere creation of an *ad hoc* body and the transfer of sensitive functions, such as judicial appointments, promotion, and the disciplinary regime

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[43] Francesco Contini & Richard Mohr, *Reconciling Independence and Accountability in Judicial Systems,* 3(2) UTRECHT LAW REVIEW 26, 27–29 (2007); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 THE GEORGETOWN LAW JOURNAL909 (2007).

[44]Charles G. Geyh, *Rescuing Political Accountability from the Realm of Political Rhetoric*, 56 CASE WESTERN RESERVE LAW REVIEW 911–935, 912 (2006).

[45] John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,* 77 NEW YORK UNIVERSITY LAW REVIEW 962 (2002).

[46] Jens Steffek, *The Legitimation of International Governance: A Discourse Approach,* 9 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 249, 253–254 (2003); Daniel Bodansky, *The Legitimacy of International Governance: A Comming Challenge for International Environmental Law?,* 93 AMERICAN JOURNAL OF INTERNATIONAL LAW, 596, 601–603 (1999).

[47] Torres Pérez, *supra* note3, at 464.

are not sufficient if this body lacks independence from other actors, such as government, parliament or judicial organizations. To answer the questions of how autonomous the Judicial Council is vis-à-vis external actors (and especially the political branches) and what the implications for the judiciary are, we will focus on three issues: the appointment of the members of the Council; the Council's internal functioning and structure; and its discretionary power to appoint judges to high posts.

Indeed, the most recent Report by the Group of States against Corruption (GRECO) of the Council of Europe, issued in 2018,[48] was very critical of the Council in these regards and denounced Spain's failure to meet the recommendations of the previous GRECO Report issued in 2013.[49] In particular, the GRECO Report recommended "carrying out an evaluation of the legislative framework governing the General Council of the Judiciary and of its effects on the real and perceived independence of this body from any undue influence, with a view to remedying any shortcomings identified."[50] In 2018, it concluded that this recommendation had not been implemented.[51]

1. The politicization of the Judicial Council through the appointment process

The appointment of the twenty members of the Judicial Council corresponds to Parliament by a three-fifths majority. The goal of this super-majority is to require broad consensus among the political parties represented in Parliament regarding the candidates to be appointed. In practice, however, the three-fifths super-majority requirement has led to a quota system.[52] As explained above, the appointment process in Spain is dominated by the two main political parties and the two main judicial associations. The Council's composition is the outcome of political negotiation between the Socialist and Popular parties regarding the number of candidates to be assigned to each party according to their strength in Parliament.

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[48] Group of States against Corruption, *Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors*, GrecoRC4(2017)18, Strasbourg, 8 December 2017 (publication date 3 January 2018).

[49] 2018 GRECO Report, *supra* note 48.

[50] *Id*. para. 34, *recommendation v*.

[51] *Id.* para. 35.

[52] Bustos Gisbert, *supra* note 10, at 30; Juan Fernando López Aguilar, *Encuesta sobre la Independencia del Poder Judicial,* 38 TEORÍA Y REALIDAD CONSTITUCIONAL 15, 31 (2016); Pablo Lucas Murillo de la Cueva, *Encuesta sobre la Independencia del Poder Judicial,* 38 TEORÍA Y REALIDAD CONSTITUCIONAL 15, 32 (2016).

When the Council was renewed in 2013, the same pattern was followed: the two primary political parties divided the number of candidates between themselves, offering three to minority parties. Among the judicial members appointed, nine of the twelve belonged to the two main judicial associations[53] while the remaining three were not associated. Subsequently, the appointed members elected as President the person that had already been announced by the media, Carlos Lesmes, who participated in the commission that prepared the 2013 legislative amendment and had served as director general of the Ministry of Justice under two legislatures (1996-2004).[54]

Clearly, then, this model has not prevented ideological polarization within the Council that undermines its purpose of securing the judiciary's independence.[55] Judging by the results, the Council members often convey the political preferences of the party that nominated them. Indeed, the voting patterns within the Council attest to a divide between the members considered progressive and those labeled conservative.[56] The media and public opinion also tends to identify the Council members with the corresponding political party.

Moreover, after serving their mandate, members of the Judicial Council are sometimes appointed to other constitutional bodies or embark on political careers.[57] The easy transition from the judicial career to politics and back, particularly for Judicial Council members, is concerning from the perspective of judicial independence. For example, the current Minister of Defense is a former judge who in the 1990s served as State Secretary in the Ministry of Internal Affairs (1994-1996), and then became a Supreme Court judge in 2004. In 2008 she was appointed to the Judicial Council and returned to the Supreme Court in 2013, before running in the 2016 general elections as the Socialist Party's second candidate to represent Madrid. Moreover, the Minister of Internal Affairs is a judge of the National Audience, who in 2013 had been appointed to the Judicial Council. Ultimately, the current situation erodes the perception of the Council's independence, and by extension that of the judiciary as a whole.

In order to curtail the risks of politicization, several scholars have called for a reform of the appointment procedure for members from the judiciary and returning to the original

[53] Four from *Asociación Profesional de la Magistratura* and five from *Jueces Para la Democracia*.

[54] Íñiguez Hernández, *supra* note 5, at 150.

[55] Ortuño Muñoz, *supra* note 32, at121.

[56] Elvira Perales, *supra* note 15, at 48; Íñiguez Hernández, *supra* note 5, at 149; Íñiguez Hernández, *supra* note 36, at 336–337.

[57] Íñiguez Hernández, *supra* note 5, at 149.

system in which the judicial members were appointed by their peers.[58] Indeed, this is the system followed in countries that have similar bodies, such as France, Italy, and Portugal.[59] Also, Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on *Judges: independence, efficiency and responsibility* endorsed selecting no fewer than half of the members of judicial councils from judges nominated by their peers from all levels of the judiciary with respect for pluralism inside the judiciary in order to protect those bodies' independence. Along the same line, the 2018 GRECO Report reiterated its view that "political authorities shall not be involved, at any stage, in the selection process of the judicial shift."[60]

In our view, the election of the twelve judges by peers certainly poses several advantages: First, the system of appointment would be more congruous with the constitutional design, as the Constitutional Court indicated in 1986. Second, it would contribute to decentralizing the power of appointment, which is now concentrated in the hands of Parliament, by incorporating another actor: the judiciary itself. In this way, the stark correlation in the eyes of the public opinion of Council members with the political parties who proposed them would be mitigated, if not eliminated. Third, the judges governed by the Council would directly participate in the election of those responsible for appointing, promoting, and monitoring them. The Council is not a representative institution as such, but the participation of the judges in appointing Council members could result in a Council more sensitive to the concerns of judges than those of political parties and thus contribute to the legitimacy of this body not only in the eyes of the judges themselves but also in the public at large.

At the same time, direct election by the judiciary would pose problems, such as the risk of corporativism and domination by judicial associations, which might reproduce the ideological divide that we seek to avert. Hence the system of election should attempt to avoid the dominance of judicial associations by offering equal opportunities of participation to all. Moreover, the appointment process should embrace pluralism and diversity in terms of geographic origin and seniority in the judicial career. Regarding the most recent renewal in 2013, among the appointed candidates not one judge was from a one-person judicial body, and four were Supreme Court judges.[61] To offer an example of how this might be done, Presno Linera has proposed a voting system in which, out of

[58]Serra Cristóbal, *supra* note 17, at 311–317.

[59]*Id.* at 308–309.

[60]2018 GRECO Report, *supra* note48, para. 37.

[61] Íñiguez Hernández, s*upra* note 5, at 150.

twelve members, judges would cast their vote for only eight, and the twelve with the highest number of votes would be elected.[62]

Given the lack of political will to institute selection of the judicial members by their peers, other measures could be taken to improve the current situation in the meantime. First, to ensure that the Council's composition does not reflect the particular configuration of Parliament at the time the Council is renewed, the selection process could be staggered so the Council is renewed in portions.[63] Since each mandate lasts five years, half the Council could be renewed every two and a half years. Second, to scale down the importance of judicial associations and room for discretion in Parliament, the nomination of judicial candidates could be delegated to the administrative chambers of the Supreme Court, the National Audience, and the High Courts of Justices.[64] The jurists could be proposed by relevant bodies such as bar associations or universities.[65]In addition, the transparency of the parliamentary deliberations could be improved by publishing the candidates' CVs and holding public hearings.[66]This would allow public scrutiny by civil society, which could also diminish the importance of the candidates' partisan or corporate allegiances.[67]

2. Internal working dynamics: the Permanent Commission

Doubts over the Judicial Council's independence may also arise from the Council's internal working dynamics. The 2013 reform introduced an important change regarding the structure of the Council that could affect its independence. Prior to 2013, all Council members were permanent and sole devotion to the Council, to the exclusion of any other professional activity, was required. Then Organic Law 4/2013 concentrated Council powers in a Permanent Commission of five members and the President.[68] At present, only the members of the Permanent Commission are full-time. At the same time, the legislative reform has further strengthened the role of the Permanent Commission to the detriment

[62] Miguel Ángel Presno Linera, *Normas y Formas de Gobierno Judicial*, XXVII CONGRESO DE JUECES PARA LA DEMOCRACIA. UNA JUSTICIA EN CONFIANZA (2017). See also the proposal by Serra Cristóbal, *supra* note 17, at 311–317.

[63] Serra Cristóbal, *supra* note 17, at 306.

[64] Bustos Gisbert, *supra* note 10, at 30.

[65] Serra Cristóbal, *supra* note17, at 319.

[66] Up to now, only the jurists go through parliamentary hearings. Serra Cristóbal, *supra* note17, at 320; López Aguilar, *supra* note52, at 31.

[67] López Aguilar, *supra* note52, at 31.

[68] Íñiguez Hernández, *supra* note 36, at 334.

of the Plenary.[69] Except for discretionary appointments and the enactment of regulations and sanctions, the decisions of the Permanent Commission may not be appealed before the Plenary, and the competences of the Plenary are limited to those listed in Article 499 LOPJ.

Only the position of the full-time members on the Permanent Commission is exclusive and incompatible with the exercise of other administrative responsibilities in the judicial field, whereas part-time members now carry on their regular professional activities, be it as judges, lawyers, or otherwise. In addition, part-time members only receive *per diem* compensation for their attendance of the Plenary or the corresponding Commission activities, instead of a full salary.[70] As Íñiguez Hernández has argued, the reform enhances the role of the President and creates two tiers of Council members.[71]

The main reasons for this reform was improving the Council's good administration and economic efficiency. It was also meant to maintain proximity between Council members and the spheres over which they are to govern. Nonetheless, the reform has been heavily criticized.[72] Indeed, its compatibility with the constitutional design is dubious.[73] While it might be wise to reduce the number of Council members for reasons of efficiency, this would require a constitutional amendment.[74] Still, making some of the members part-time can be regarded as a masked constitutional change.

Moreover, making judges in active service part-time members of the Council clashes with the exclusivity clause of the judicial function,[75] and the prohibition on exercising other public functions.[76] Indeed, the Socialist congressional deputies challenged the creation of part-time Council members by Organic Law 4/2013 before the Constitutional Court, whose decision is still pending.

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[69] Francisco Javier Donaire Villa, *La Renovada Configuración de la Comisión Permanente del Consejo General del Poder Judicial tras la Ley Orgánica 4/2013,* in INDEPENDENCIA JUDICIAL Y ESTADO CONSTITUCIONAL. EL GOBIERNO JUDICIAL 51 (Luis Aguiar de Luque ed., 2016).

[70] Article 584 bis LOPJ.

[71] Íñiguez Hernández, *supra* note 5, at 151; Íñiguez Hernández, *supra* note 36, at 333.

[72] Gerpe Landín & Cabellos Espiérrez, *supra* note 15, at 24–25; Íñiguez Hernández, *supra* note 36, at 333.

[73] Diego Íñiguez Hernández, s*upra* note5, at 155.

[74] Murillo de la Cueva, *supra* note 52, at 36.

[75] Constitution Article 117(4).

[76] Constitution Article 127.

Ultimately, part-time service may not only undermine the independence of the Council, but also the independence and impartiality of the individual judges who continue their regular jurisdictional functions.[77] The perception of the independence and impartiality of judges in active service could suffer from association with the political party that supported their appointment as Council members. As for the non-judicial members, they will have to address the tension between their regular and Council activity. For example, lawyers will have to manage the tension between their counseling and representation of litigants before the courts and their role as decision-makers on sensitive issues including the promotion and the discipline of judges.

Moreover, this arrangement is at odds with the guidelines of the Consultative Council of European Judges[78], which point out that "full-time attendance means a more effective work and a better safeguard of independence."[79] The 2013 GRECO Report echoed these concerns, arguing that "The change in approach has reportedly been justified on efficiency grounds, but some in the profession argue that this reduces the work capacity of the [Council] and further weakens its independence."[80] It added that "given the key decision-making role that the [Council] plays in vital areas of the judiciary, including on appointments, promotion, inspection and discipline concerning judges, it is crucial that this body is not only free, but also seen to be free from political influence. When the governing structures of the judiciary are not perceived to be impartial and independent, this has an immediate and negative impact on the prevention of corruption and on public confidence in the fairness and effectiveness of the country's legal system."[81]

3. Discretionary appointments to high judicial positions

Judicial promotion is among the functions that the Constitution attributes to the Council. As mentioned above, the Council enjoys a significant degree of discretion regarding the appointment of judges to higher courts and presidency positions. This discretionary power could directly affect the perception of independence of the judiciary as a whole as well as the independence and impartiality of individual judges.[82] For instance, judges who want to

[77]Bustos Gisbert, *supra* note 10, at 30.

[78]Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society.

[79]*Id.* para. 34.

[80] Group of States against Corruption, *Fourth Evaluation Round. Corruption Prevention in respect of members of Parliaments, judges and prosecutors*, GRECO Eval IV Rep (2013) 5E, Strasbourg, 2-6 December 2013, para. 79.

[81]*Id.* para. 80.

[82]Gómez Fernández, *supra* note33, at 97–100.

be promoted might curry the favor of certain political parties by adopting their positions or otherwise making their ideological or political opinions known. This is one way that political factors might unduly affect the promotion of judges and interfere with adjudication.[83]

The politicization of the Council could even make political contacts more important for obtaining positions at the peak of the judiciary.[84] Similarly, those who belong to the most powerful judicial associations also stand better chances for promotion because of the weight of the judicial associations in the selection of Council members.[85] Several scholars have already recognized the importance of ideological and personal proximity in the promotion to high judicial positions.[86]For instance, in 2014, the clash between progressive and conservative Council members spilled into the press when two conservative judges were appointed to the Supreme Court. In fact, one of the judges was a former Council member, who at that time compared same-sex marriage to the union of a person with an animal.[87]

Besides political polarization, the patterns of appointment also show troubling cleavage in terms of gender and geography.

Percentage of women judges in the Supreme Court by Chamber (2018)

Civil (First Chamber)	Criminal (Second Chamber)	Administrative (Third Chamber)	Labor (Fourth Chamber)	Military (Fifth Chamber)
10%	7,1%	12,1%	33%	12,5%

Source: Rafael Bustos Gisbert, *Sesgos en la composición de los altos tribunales: género y procedencia*.[88]

[83] Eva Desdentado Roca, *Los Problemas del Control de Discrecionalidad en los Nombramientos de Altos Cargos Judiciales por el Consejo General del Poder Judicial. Un Análisis Crítico,* 139 REVISTA ESPAÑOLA DE DERECHO ADMINISTRATIVO (2008).

[84] Perfecto Andrés Ibáñez, *Racionalizar y Moralizar la Política de Nombramientos*, 52 JUECES PARA LA DEMOCRACIA 12-18 (2005).

[85] Serra Cristóbal, *supra* note17, at 317.

[86] Bustos Gisbert, *supra* note10, at 37; López Aguilar, *supra* note52, at 38–39; Íñiguez Hernández, *supra* note5, at 153.

[87]https://politica.elpais.com/politica/2014/04/27/actualidad/1398623319_970402.html

[88]http://agendapublica.elperiodico.com/sesgos-en-la-composicion-de-los-altos-tribunales-genero-y-procedencia/

Only in the Labor Chamber was the percentage above 13%. Moreover, none of the female judges held supervisory positions (President, Vice-president, or Chamber President). Regarding the judges' origin, considering the position they held before their appointment to the Supreme Court reveal the following distribution:

Autonomous Community of prior office of Supreme Court judges

Madrid: 40	Andalusia: 9	Catalonia: 8	Castile & Leon: 4
Valencia: 4	Galicia: 3	Castile la Mancha: 3	Murcia: 2
Canary Islands: 1	Aragon: 1	Asturias: 1	Basque Country: 1
Extremadura: 1	Cantabria: 1	Balearic Islands, La Rioja, Navarre: 0	

Source: Rafael Bustos Gisbert, *Sesgos en la composición de los altos tribunales: género y procedencia*.[89]

This table shows that the majority of the judges appointed to the Supreme Court were already in Madrid (50,6%). The next largest groups of judges came from Andalusia and Catalonia (11,3% and 10,1%, respectively). There is a clear geographical bias in the sense that about half of the Supreme Court judges were selected among judges who were already in Madrid.

The current legal framework for and practice of appointing judges may very well impair judicial independence.[90] In addition to the legislative reforms mentioned above, and more importantly from the perspective of practical impact,[91]in 2006 the Supreme Court issued a judgment representing a shift in its case-law.[92] The Supreme Court asserted the power to revise the appointments made by the Judicial Council setting the principles of merit and capacity as limits to the Council's discretion.[93] The Supreme Court required that the Council decisions reflect the proper motivations in order to avoid arbitrariness. It argued that the confidence of the public was at stake.

[89] http://agendapublica.elperiodico.com/sesgos-en-la-composicion-de-los-altos-tribunales-genero-y-procedencia/

[90] Gómez Fernández, *supra* note33, at 98.

[91] *Id.* at 75–79.

[92] STS 3171/2006, 29 May 2006.

[93] Juan Igartua Salaverría, *Motivación de Nombramientos Discrecionales: Posterioridades de la STS 3171/2006, caso Gómez Bermúdez,* 58 JUECES PARA LA DEMOCRACIA23 (2007).

The Judicial Council subsequently passed Regulation 1/2010, 25 February 2010, *on the provision of discretional positions in judicial bodies*, in order to make the criteria to be followed more transparent and avoid arbitrariness. The Regulation distinguished between positions of jurisdictional and administrative nature (or both), and listed the merits to be considered for each type of appointment. For instance, regarding the judges for the Supreme Court, the selection criteria include the length of active service, experience in the jurisdictional field of destination, length of service in collegiate judicial bodies, and the number of especially relevant judicial decisions and their technical quality. Regarding administrative positions, the criteria include previous participation in administrative chambers of courts and the candidates' proposed program of action for the specific position.

Furthermore, Regulation 1/2010 contains the procedure to be followed, which also incorporated new elements for greater transparency: the vacancies are to be announced in the Official Bulletin of the State, and the call for applications is to include the merits that will be taken into consideration. The candidates' applications are to demonstrate fulfillment of the formal requirements and the criteria identified in the call. With regard to vacancies for managerial positions,[94] a public hearing is to be held before the Judicial Council in which the candidates are to explain and defend their professional experience and accomplishments, with special reference to the merits indicated in the call and, when relevant, the corresponding action program they propose.

Media professionals accredited before the Judicial Council are allowed to attend and record these public hearings, though the presence of the general public and media maybe limited in extraordinary circumstances, for instance after taking into account the principle of proportionality and the possibility that other rights and interests must be protected.[95]
The Permanent Commission is to select three candidates and submit a reasoned resolution to the Plenary of the Judicial Council. The members of the Plenary may consider candidates who were rejected by the Permanent Commission in their final decision. The final selection must also be duly reasoned, a requirement that is fundamental in light of potential appeal to the Supreme Court.[96]

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[94] In 2013, the public hearing was extended also to the candidates to judicial positions at the Supreme Court among jurists of recognized competence, Decision of 12 March 2013, Plenary of the General Council of the Judiciary to modify Regulation 1/2010, 25 February 2010, on the provision of discretional positions in judicial bodies.

[95] Article 16(3)(b) Regulation 1/2010.

[96] JUAN IGARTUA SALAVERRÍA, LA MOTIVACIÓN EN LOS NOMBRAMIENTOS DISCRECIONALES (2007).

Even though the case law of the Supreme Court and Regulation 1/2010 have improved the transparency and objectivity of the Council in terms of appointment and promotion,[97] these processes remain highly discretional. Because the weight of each criterion is not specified, the Council enjoys a broad margin of discretion in assessing and balancing them.

Indeed, the 2013 GRECO Report "recommended that objective criteria and evaluation requirements be laid down in law for the appointment of the higher ranks of the judiciary, i.e. Presidents of Provincial Courts, High Courts of Justice, the National Court and Supreme Court judges, in order to ensure that these appointments do not cast any doubt on the independence, impartiality and transparency of this process."[98] In 2018,the GRECO Report "noted the lack of any legislative development to lay down objective criteria and evaluation requirements for the higher ranks of the judiciary." It concluded, therefore, that its recommendation had not been implemented.[99]

Several analysts have called for more transparent, objective criteria and procedures. The evaluation of candidates could be performed through objective tests, by asking them to draft judgments for hypothetical or real cases, for example, and mechanisms for continuing evaluation could be introduced. Also, having an independent commission evaluate the candidates' merits prior to the decision by the Council would make the process more objective.[100]

In sum, there are several reasons to question the independence of the Council: the process of appointment that is dominated by the main political parties and judicial associations; the concentration of functions in a reduced Permanent Commission; and the Council's broad margin of discretion for high judicial appointments. The Council's politicization threatens its capacity to secure external judicial independence and the perception of the judiciary's independence. At the same time, at the level of individual judges, there is no clear evidence that their decisions consistently favor particular actors or that they broadly lack independence and impartiality.[101] Indeed, the 2013 GRECO Report emphasized the divergence between the assessment of the independence of individual judges, and of the independence of the Council: "while the independence and impartiality of individual judges and prosecutors have been broadly undisputed to date, much controversy

[97] Murillo de la Cueva, *supra* note 52, at 25.

[98] 2013 GRECO Report, *supra* note80, para. 39.

[99] 2018 GRECO Report, *supra* note48, para. 40.

[100] Andrés Ibáñez, *supra* note84, at 13–15; Luis Rodríguez Vega, *La independencia judicial a prueba,* https://laclavejudicial.org/2018/02/21/la-independencia-judicial-a-prueba/

[101] Murillo de la Cueva, *supra* note 52, at 24–25, 27.

surrounds the issue of the structural independence of the governing bodies of the judiciary and the prosecutorial service – the primary concern being the appearance that partisan interests could penetrate judicial decision-making processes."[102]

II. The disciplinary regime and other forms of judicial accountability

Despite increasing interest regarding judicial accountability,[103] there is little doubt that this notion remains elusive.[104] Accountability can be understood in broad or restrictive terms. Bovens distinguished two primary notions of accountability: as a virtue and as a mechanism. As a virtue, accountability is employed as a normative concept, as a set of standards to guide the behavior of actors. As a mechanism, accountability involves "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."[105]

Next we will focus on the more restricted notion of judicial accountability as a mechanism. From that perspective, a range of implications inherent in the notion of accountability must be teased out: to whom should judges be accountable and which supervisory or control procedures should be implemented? What are the standards against which judges may be held accountable? And what are the consequences that might follow?

1. The disciplinary regime

From a legal perspective, the disciplinary regime for judges can be understood as a form of accountability in a strict sense. As such, *to whom* are judges accountable? According to the Constitution, the Judicial Council has the formal power to hold the judges accountable through the inspection program and the disciplinary regime.[106] That is why the Council, not political bodies, initiate disciplinary proceedings against judges. Also, Administrative chambers and court presidents are granted inspection and disciplinary powers.

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[102] 2013 Greco Report, para. 3.

[103] Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 THE GEORGETOWN LAW JOURNAL909 (2007); DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE (2010); DAVID KOSAR, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES(2016).

[104] Francesco Contini & Richard Mohr, *Reconciling Independence and Accountability in Judicial Systems,* 3(2) UTRECHT LAW REVIEW 26, 26–27 (2007).

[105]Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 WEST EUROPEAN POLITICS 946 (2010).

[106]Constitution Article 122(2).

As mentioned above, Organic Law 4/2013 introduced several changes regarding the control of disciplinary proceedings. The Prosecutor is to receive complaints about judicial organs and undertake the instruction procedure. The power to conclude the proceedings and adopt sanctions depends on the qualification of the facts. For minor offenses, the competent bodies are the administrative chambers of courts or their Presidents, depending on the sanction. For serious or very serious offenses, the competent body is the Council's Disciplinary Commission, with the exception of those cases in which the Prosecutor proposes the judge's removal, in which case the resolution corresponds to the Plenary of the Council. It should be remembered that the members of the Disciplinary Commission are now part-time Council members, a circumstance that may undermine the perception of independence.[107]

Next, *for what offenses* and *what are the standards* against which judges may be held to account? Judges must respond for actions taken in the exercise of their functions, yet they cannot be disciplined for the exercise of jurisdictional functions, for such sanctions would compromise their independence.[108] The interpretation and application of the law cannot be the object of the disciplinary power. Actionable offenses are classified in three groups: very serious (for example, affiliation to political parties or trade unions, the unjustified and reiterated delay of proceedings, abuse of office to obtain favorable treatment from the authorities); serious (including abuse of authority or lack of consideration for citizens and officials who take part in the proceedings, or unjustified delays); and minor (such as the failure to meet procedural deadlines in issuing decisions).[109]

Finally, *what are the consequences or effects* that might follow*?* In the context of the disciplinary regime, the effects take the form of sanctions. According to Article 420 LOPJ, the sanctions that can be imposed upon judges are: warnings; fines up to 6000 Euros; forced transfer to another court; suspension from office for up to 3 years; and removal. According to LOPJ, the duration of the disciplinary proceedings is limited to 6 months.[110] In 2013, the GRECO Report recommended extending the limit,[111] since the short time span had given rise to a number of decisions of the Supreme Court overturning the sanction of

[107] Gerpe Landín & Cabellos Espiérrez, *supra* note 15.

[108] Luis López Guerra, *Modelos de Gobierno de los Jueces*, 1 PARLAMENTO Y CONSTITUCIÓN. ANUARIO 14 (1997).

[109] Articles 417–419 LOPJ.

[110] Article 425(6) LOPJ.

[111] 2013 GRECO Report, *supra* note 80, *recommendation* viii.

the Council on the grounds that the relevant disciplinary proceedings had not respected the statute of limitations, but this recommendation has not been implemented.[112]

Information about the frequency and intensity of disciplinary sanctions is provided in the Council's Annual Report to Parliament. According to the 2017 Report,[113] the Prosecutor submitted twenty-five proposals of sanctions in 2016: ten were dismissed and in fifteen instances sanctions were imposed. The main reasons for dismissal were failure to prove responsibility or lapse of the statute of limitations. Most of the sanctions were for unjustified delays. These statistics were very similar in the previous year's report.

2. Code of judicial ethics

Taking a broader perspective, we might consider other instruments of judicial accountability, such as judicial codes of conduct or ethics. In December 2016, the Plenary of the Judicial Council released a document on "Principles of Judicial Ethics"[114] adopted in response to international instruments on the subject, such as the Bangalore Principles of Judicial Conduct (2002); or the Council of Europe's Recommendation of the Committee of Ministers CM/R(2010)12 to the member states on Judges: independence, efficiency and responsibilities. Moreover, the 2013 GRECO Report recommended that Spain adopt a code of conduct for judges.

The "Principles of Judicial Ethics" contain two main sections. The first enumerates the principles to be followed: independence, impartiality, integrity, courtesy, diligence, and transparency. Effort is made to specify the requirements that derive from these general principles. The second section foresees the creation of a Commission of Judicial Ethics whose functions would include issuing opinions in response to the requests made by courts' administrative chambers, judicial associations or individual judges, as well as drafting reports on issues of general interest and promoting the principles of judicial ethics. The Commission is to be composed of seven members: one judge, three magistrates, two magistrates of the Supreme Court, and one professor with recognized expertise in this domain. The judicial members of the Commission are to be elected by their peers who would in turn elect the lay member.

The creation of this Commission, however, is still pending, and the impact of this document has been scarcely noticeable in practice. Indeed, its Preamble distinguishes the disciplinary regime from judicial ethics, and understands that the latter as voluntary and

[112] 2018 GRECO Report, *supra* note 48, para. 52.

[113] 2017 Annual Report of the General Council of the Judiciary, at 39.

[114] http://www.poderjudicial.es/cgpj/es/Temas/Transparencia/Buen-Gobierno-y-Codigo-etico/Codigo-Etico/

not as entailing legal responsibility. The principles are conceived as *ex ante* standards to guide judicial behavior, but lack any specific effect in case of breach. The Commission of Judicial Ethics never has more than a consultative nature, but it could at least contribute in solving ethical dilemmas and communicating to the broader public through its reports.

3. Democratic accountability

Finally, from the standpoint of democratic accountability, to what extent is the judiciary as a whole accountable to Parliament?[115] Judges are charged with applying the law, and only the law, to the resolution of the individual cases brought before them. By doing so, the application of the law becomes a source of democratic legitimacy. Nonetheless, the law is not completely determinate and its interpretation thus leaves room for discretion. There is sometimes a risk that judges read their own values into the law.[116]Judges also play a part in the creation, modification or reinforcement of norms through adjudication.[117]Any form of direct control, however, of Parliament over judicial decisions would aggrieve judicial independence, which is unnecessary since Parliament has the power to control courts in other ways, namely through legislative amendment.

All the same, we might wonder whether some form of accountability of the Judicial Council before Parliament could have democratic benefits. On the one hand, the election of the Council members by the Parliament could contribute to the Council's democratic legitimacy at an initial moment.[118] Nonetheless, as argued above, the practice of appointing judges along ideological lines has impaired the Council's independence.

Regarding the functioning of the Judicial Council, the Annual Report that the Council must submit to Parliament could be regarded as a soft form of accountability, even though it entails no specific effects or consequences.[119] At most, Parliament may summon the President of the Supreme Court for questioning about the Report.[120] Still, the presentation

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[115] Mario Hernández Ramos, *El Cambio de Paradigma en el Control del Poder Judicial como Institucióne España. De la Responsabilidad Judicial a la Judicial Accountability,* in INDEPENDENCIAJUDICIAL Y ESTADO CONSTITUCIONAL. EL ESTATUTO DE LOS JUECES 149, 165–175 (Maribel González Pascual & Joan Solanes Mullor eds., 2016).

[116] Aida Torres Pérez, *In Nobody's Name: A Checks and Balances Approach to International Judicial Independence*, MPIL Research Paper Series No. 2017-3.

[117]ARMIN VON BOGDANDY& INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONALADJUDICATION 12–14 (2014).

[118] Luis López Guerra, *La Legitimidad Democrática del Juez*, 1 CUADERNOS DE DERECHO PÚBLICO 43, 70 (1997).

[119]Article 563(1) LOPJ.

[120]Article 563(3) LOPJ.

of the Report might be conceived as an opportunity for dialogue between the Parliament and the Judicial Council about the state of the judicial system, its main problems and needs. The current President of the Council, Carlos Lesmes, on the occasion of his presentation of the Annual Report of 2012 before the congressional Justice Commission, declared his wish to initiate a new stage of interaction between the judiciary and Parliament through new mechanisms of communication not limited to the presentation of the Annual Report in order to enhance institutional collaboration and dialogue.[121]Notwithstanding, Organic Law 4/2013 adopted a restrictive approach in Article 564 LOPJ, according to which, except for the presentation of the Annual Report mentioned above, the President of the Supreme Court and the Council members are under no obligation to appear before Parliament to discuss their functions.

III. The role of the Judicial Council in promoting transparency

Transparency facilitates the operation of accountability mechanisms by ensuring the relevant information is available, but transparency is not an accountability mechanism in and of its own.[122]Transparency is not an end in itself, and its value in the judicial realm has various dimensions: transparency enables public scrutiny of the judicial activity, which might further public debate and thereby enhance public confidence. Transparency might even act as a counterweight to potential sources of undue influence or interference by other public authorities by shedding light on appointment procedures or the internal organization of courts. Hence, transparency could potentially mitigate or counteract constraints on judicial independence emanating from external actors by providing the public at large with essential information.[123]

What has been the impact of the Judicial Council with regards transparency? In recent years, the Judicial Council has taken pains to improve transparency surrounding its own activity and that of the judiciary as a whole.[124] Indeed, transparency has become one of the primary guiding principles for the current Council.[125] The Permanent Commission even created a Working Group on Transparency on 7 January 2014 that was renewed in 2016.[126]

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[121]Hernández Ramos, *supra* note115, at 173.

[122]Kosar, *supra* note103, at 102.

[123]Torres Pérez, *supra* note3, at 477–478.

[124]Hernández Ramos, *supra* note115, at 178–180.

[125]2017 Annual Report to Parliament, http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Memorias/

[126]http://www.poderjudicial.es/cgpj/es/Temas/Transparencia/Buen-Gobierno-y-Codigo-etico/Grupo-de-Trabajo-sobre-Transparencia/

In addition, the Council created a Website on Transparency[127] to facilitate citizen access to information about the Council, its activity, its use of public resources, the reasons for its decisions, and other subjects of public interest. This website includes three main areas: economic and financial information; Council activity; and judicial transparency. Regarding the economic and financial information, the website describes the Council budget and its management and details such as the travel expenses of Council members. It also discloses salaries and the funds approved for the development of external activities.

Regarding the activity of the Judicial Council, the website contains links to Council agreements, agreements with other institutions (national and international), relevant studies, the Annual Report, and the reports on drafts of bills before the legislature. Remarkably, the Council offers specific information on the selection processes for the discretional appointment of judges. For each vacancy, the call, the names of the candidates and their CVs, the videos of the hearings, the proposal of the Permanent Commission, and the Plenary appointment decision are all made available. The CVs and the interviews of rejected candidates are removed on request after two months or, otherwise, after nine months.

As regards the activity of the judiciary, the website includes a directory of all judicial bodies, a dataset on corruption trials; relevant studies and statistics. Also, the Council manages the CENDOJ, a database that compiles all judgments issued by collegiate bodies: the Supreme Court, the National Audience, the High Courts of Justice, and Provincial Courts, as well as selected judgments from lower courts. Furthermore, the Council spurred the creation of transparency websites for several judicial bodies. So far, the following bodies have their own transparency websites: the Supreme Court, the National Audience, and the High Courts of Justice of each Autonomous Community. In sum, the Council has labored to provide the public with broad, easily available information and promote increased transparency regarding judicial activities. The principal shortcoming regarding transparency remains the appointment process for the members of the Council itself.

IV. Judicial self-government and public confidence in the judiciary

Public confidence in the judiciary is crucial for its sociological legitimacy and, by extension, the proper functioning of the legal system. As Tom Tyler has shown, confidence in the judiciary expressed as institutional legitimacy derives from the positive assessment of procedural fairness rather than from the outcomes of specific cases.[128] To measure the

[127] Agreement of the Permanent Commission of 17 March 2015: Portal de Transparencia "José Luis Terrero Chacón": http://www.poderjudicial.es/cgpj/es/Temas/Transparencia/

[128] Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?,* 19(2) BEHAVIORAL SCIENCES AND THE LAW 215 (2001).

impact of the Judicial Council on the perception of the judiciary as a whole in the public opinion from this institutional perspective, we must rely on statistical studies, which are scarce.

In general, the Eurobarometer reveals that more than half of Spain's population tends not to trust the justice system. In the last four years, however, the trend has improved. In 2014, 71% of the population tended to distrust the justice system, while in November 2017 the percentage was down to 56%.

Trust on the justice system in Spain

[129]

	2014 (Nov)	2015 (May)	2016 (May)	2016 (Nov)	2017 (May)	2017 (Nov)
Tend to trust	25%	35%	40%	43%	37%	42%
Tend not to trust	71%	62%	56%	53%	62%	56%
Don't know	4%	3%	4%	4%	1%	2%

Source: Eurobarometer.[130]

In addition to the statistics compiled by the European Union, the General Council of the Spanish Bar (*Consejo General de la Abogacía Española*) carries out two types of statistical studies on the perception of justice in the Spanish society: the external barometer, addressed to the civil society at large; and the internal barometer, which focuses on the opinion of lawyers.[131] The last published studies date from 2015.

According to the internal barometer, 91% of the lawyers agreed with the assertion that "[g]overnments, of all ideologies, are generally more interested in trying to control justice or to influence it, than to launch a profound reform on its functioning in order to modernize it and making it fully efficient" (Question 1); and 92% agreed that "[t]he attempt of the several parties to control the Judicial Council hinders the efficient development of its functions" (Question 2). Hence, there is a widespread opinion among

[129] The question about the trust on justice and the national legal system was only introduced in 2014.

[130] http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/index#p=1&instruments=STANDARD

[131] http://www.abogacia.es/2015/11/25/barometros-de-la-abogacia/

those who interact on a daily basis with the courts that the Judicial Council is under the influence of the main political parties. This perception has tended to increase over time:

		2015	2012	2009
Question 1	Agree	91%	92%	87%
	Disagree	8%	7%	12%
Question 2[132]	Agree	92%	92%	85%
	Disagree	6%	7%	12%

Source: Internal barometer of the General Council of the Spanish Bar.[133]

According to the external barometer, 81% of the respondents agreed upon that "[a]ll governments, of whatever color, have been more interested in controlling justice than providing the sufficient means in order to improve it"; and 90% concur that"[i]t is urgent to reach a state agreement about the justice system that protects it in a clear and credible form before influences and interferences of a political nature."

Citizens were also questioned about the role of the Judicial Council.[134]The results reveal general distrust of the citizens on the Council. More than half believe that the Council does not fulfill its main purpose of ensuring judicial independence. Almost 80% believe that high judicial appointments by the Council respond to political or personal motivations; and 88% hold that the Council became too susceptible to political influence after the reform that introduced the Permanent Commission. Public confidence has also trended downward over time.

[132] In 2009, the question was a bit different: "The General Council of the Judiciary has become so politicized that it can hardly manage in an efficient and impartial way the functioning of the Judiciary."

[133]http://www.abogacia.es/wp-content/uploads/2012/05/INFORME-GENERAL-BAROMETRO-INTERNO-CGAE-JULIO-2015.pdf

[134]http://www.abogacia.es/wp-content/uploads/2015/07/INFORME-V-BAROMETRO-EXTERNO-CGAE-NOVIEMBRE-2015.pdf, at 13 [author's translation]

Do you agree with the following statements about the General Council of the Judiciary?		
	2015	2011
According to its current organization and functioning with a Permanent Commission that is responsible for most operations, the Judicial Council is too susceptible to political influence and conditions.		
Yes	88%	X
No	7%	X
Neither agree nor disagree	1%	X
The General Council adequately fulfills its function of defending the independence of judges and courts.		
Yes	31%	37%
No	58%	44%
Neither agree nor disagree	2%	5%
The General Council tends to make decisions about judicial appointments according to political or personal reasons rather than relying exclusively on technical and professional factors.		
Yes	79%	68%
No	16%	20%
Neither agree nor disagree	2%	2%

Source: External barometer of the General Council of the Spanish Bar.[135]

Hence, lawyers and civil society overwhelmingly believe that political parties seek to control the justice system. The perception of citizens regarding the role of the Council is particularly negative. Yet when individuals were asked about the impartiality of judges (that question was not posed to lawyers), 50% agreed that in general they tend to be impartial, while 42% believed that they were not. As such, the level of distrust regarding individual judges is lower than distrust of the Council, but still high.

The perception that the justice system is overly politicized is intimately linked to the Judicial Council and the model it follows for the appointment of its members and the high judicial positions. Every time the Council is renewed, citizens are aware that quotas are negotiated among the main political parties and that the selection is made along ideological lines. For instance, newspapers have published the correlation between progressive and conservative Council members and the parties that appointed them. Regarding appointments to the Supreme Court, the media tends to present the

[135] http://www.abogacia.es/wp-content/uploads/2015/07/INFORME-V-BAROMETRO-EXTERNO-CGAE-NOVIEMBRE-2015.pdf, at 13 [author's translation].

information about new appointments as the result of negotiation between the progressive and conservative members within the Council. This arrangement undermines public confidence in the Council and, by extension, in the judiciary, given the sensitive functions of appointment and discipline with which the Judicial Council is tasked.

Scandals involving the Council have also undermined its image before the public opinion. For instance, in 2012 the press revealed that the President of the Council and the Supreme Court, Carlos Dívar, used public funds to cover the expense of thirty-two trips to the southern coast of Spain that included stays at luxury hotels and meals at expensive restaurants. He claimed that he had taken the trips in his professional capacity as a representative of the Council, but in the end he was nonetheless compelled to resign by the public pressure.[136]

A similarly derisory perception is shared by scholars, who have denounced the politicization of the Council as a consequence of the informal quota system devised by the two main political parties to elect Council members together with the use of the discretional power to appoint high-ranking judicial officers.[137] In the end, it is urgent to de-politicize the Council, modify the system of appointing their members and the internal process for the appointment of high judicial positions in order to recover public confidence.

D. Concluding remarks

The emergence and evolving importance of judicial independence is intimately linked to the principle of the separation of powers.[138] In the *Spirit of Laws*, Montesquieu argued for the need to separate the judicial function from the legislative and executive in order to protect liberty: "There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[139]

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[136]https://www.nytimes.com/2012/06/22/world/europe/spains-chief-justice-divar-quits-over-trips.html; https://politica.elpais.com/politica/2012/06/21/actualidad/1340263648_089791.html

[137] Murillo de la Cueva, *supra* note 52, at 24–26, 32–33; Bustos Gisbert, *supra* note 10, at 30; Íñiguez Hernández, *supra* note 5, at 155.

[138]Pasquale Pasquino, *Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History*, 2 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 14–15(2003).

[139]MONTESQUIEU, THE SPIRIT OF THE LAWS, Book 11, Chapter 6, 157 (1989).

The rationale for the creation of Spanish Judicial Council was tied to ensuring external judicial independence and disempowering influence from the political branches. Notwithstanding, the Judicial Council is itself an institution that does not fit the classical separation of powers into three branches: legislative, executive, and judicial. While the Council is neither part of the executive nor the judicial power, it was instituted for the self-government of the judiciary. Indeed, separation of powers as a principle has evolved over time in the face of the growing institutional complexity to the point that it is no longer understood as a pure tripartite separation (if it ever was).[140]

The strategy for the safeguard of judicial independence consisted of creating and vesting a new institution with the functions related to the appointment, promotion, and discipline of judges that were traditionally under the purview of the executive. Nonetheless, transferring functions to a new institution is doomed to fail as a mechanism for external judicial independence if this new institution falls under the influence of the political branches. In Spain, the Council has been politically captured as a consequence of the method adopted to make appointments and the internal practices of the Council. The successive reforms of the Council have not managed to resolve this problem. As a consequence, the perception among the general public regarding the role of Council and the impact upon the judiciary is as a whole very negative. Nevertheless, as attested by the 2013 GRECO Report, the independence and impartiality of individual judges has not been broadly challenged.

Should then the Judicial Council be abolished? The Council has had a relevant role in promoting transparency, and the result of transferring the Council's functions back to the government would probably be worse in terms of political influence and public perception. In some sense, adopting the institutional option for an *ad hoc* judicial self-government institution involved creating a sort of interface between the judiciary and the political branches. In Spain, the political capture of that interface prevents it from serving its purpose and that failure has contributed to undermining public confidence in the judiciary as a whole. The institutional design and current practice urgently requires revision. Yet another reform, however, will accomplish nothing unless the political culture of "appropriating" purportedly independent public institutions by the political parties is abandoned.

[140] EOIN CAROLAN, THE NEW SEPARATION OF POWERS: A THEORY OF THE MODERN STATE (2009); CHRISTOPH MÖLLERS, THE THREE BRANCHES. A COMPARATIVE MODEL OF SEPARATION OF POWERS (2013).

Articles

Judicial Self Government in the Netherlands: Demarcating Autonomy

*By Elaine Mak**

Abstract

Based on which values and to what extent does a specific legal system endorse a model of self-government of the judiciary? How is such self-government shaped? Which lessons can be drawn from practical experiences relating to major organizational reforms? This article addresses these questions with the aim of analyzing the influence of reforms of judicial self-government in the Netherlands on the realization of the core values of independence, accountability, legitimacy, transparency of, and public confidence in the judiciary. Furthermore, this article assesses the influence of reforms of judicial self-government on the separation of powers and democracy as organizing principles for the Dutch legal system. The main focus of the article is on the interaction between rule-of-law values and New Public Management (NPM) values for judicial organization, taking into account the meaning and weight of these values over time in the evolving Dutch legal system. Furthermore, the analysis addresses both the legal framework for judicial government and tensions that have occurred between key actors, in particular judges and the Council for the Judiciary, in their experiences with this legal framework in practice. A red thread which runs through this analysis concerns the demarcation of spheres of autonomy for the different actors in the judicial system. The analysis of organizational reforms clarifies that a dynamic interaction has developed between judges, the bodies for judicial self-government in the Dutch system and the Minister of Justice and Security, revolving around claims of autonomy. The evolved framework of rule-of-law and NPM values for the judicial organization provides a theoretical "lens" for understanding this interaction and its outcomes.

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The architecture of the Dutch judicial organization, which encompasses the courts and the judges and staff members working in these courts, has been changed in a profound manner in the last three decades. From its beginnings in the French period (1795-1813) until the 1990s, the judicial organization had been an edifice of autonomous units connected in a "flat" organizational structure at the service of the independent and impartial administration of justice. Judges had a high degree of autonomy in organizing their work and a director for court support at each court, acting on behalf of the Ministry of Justice, dealt with budgetary issues. This traditional structure came to be questioned with the rise of governance based on theories of New Public Management (NPM) in the 1990s, which advocated a more "business-like" approach to the functioning of public institutions and introduced new organizational values for realizing this approach: effectiveness, efficiency, and a client-oriented system.[1] Simultaneously, calls had increased for the "organizational emancipation" of the judiciary in the balance of powers, in the sense of a transfer of governing and budgetary competences from the Ministry of Justice to the judiciary.[2] Such a transfer of competences would fit with the evolved conception of separation of powers in the Dutch system. Indeed, the traditional role of the executive branch in the governance of the institutions of the state, including the judiciary, did not fit well with the role that the judiciary had developed in the 20th century as an important actor in the development of the law and the review of administrative action.[3] Under the effects of the NPM theories and the increased call for judicial self-government, the Dutch judicial organization has been remodeled into a more streamlined and hierarchical system based on a balancing of traditional rule-of-law values and new organizational values. In this system, the autonomy of judges and courts in the organizational architecture had to be redefined and new actors, in particular the Council for the Judiciary established in 2002, were challenged to find their place. After the first decade of experience with this system, the reform of the judicial map in 2013 revived tensions that had come to the fore in practice and triggered further debates.

The reforms of the Dutch judicial organization highlight the issue of government of the judiciary and in particular the issue of judicial self-government. Based on which values and to what extent does a specific legal system endorse a model of self-government of the judiciary? How is such self-government shaped? Which lessons can be drawn from practical experiences relating to major organizational reforms? This article will address these questions with the aim of analyzing the influence of reforms of judicial self-

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[1] E. Mak, *The European Judicial Organisation in a New Paradigm: The Influence of Principles of "New Public Management" on the Organisation of the European Courts* (2008) 14 *EUROPEAN LAW JOURNAL* 718 (2008).

[2] Adviescommissie toerusting en organisatie zittende magistratuur (Commissie Leemhuis), *Rechtspraak bij de tijd* (The Hague 1998), 10.

[3] S.K. Martens & T.B. ten Kate, *Commentaar d.d. 27 oktober 1999 van de President van en de Procureur-Generaal bij de Hoge Raad op de concept-wetsvoorstellen organisatie en bestuur gerechten en Raad voor de Rechtspraak* NEDERLANDS JURISTENBLAD 1615 (2000). *See infra*, A.II.

government in the Netherlands on the realization of the core values of independence, accountability, legitimacy, transparency of, and public confidence in the judiciary. Furthermore, this article will assess the influence of reforms of judicial self-government on the separation of powers and democracy as organizing principles for the Dutch legal system.[4] The main focus of the article will be on the interaction between rule-of-law values and NPM values for judicial organization, taking into account the meaning and weight of these values over time in the evolving Dutch legal system. Furthermore, the analysis will address both the legal framework for judicial government and tensions that have occurred between key actors, in particular judges and the Council for the Judiciary, in their experiences with this legal framework in practice. A red thread which runs through this analysis concerns the demarcation of spheres of autonomy for the different actors in the judicial system. For judges, this autonomy can be defined as their authority for making decisions on matters within their competence while demonstrating awareness of the demands of the judicial organization and the society and taking responsibility for their decisions.[5] A similar definition can be used for reflecting on the role and space for maneuvering of governing bodies within the judiciary, such as the Council for the Judiciary and the Management Boards at the courts. The analysis of organizational reforms will clarify that a dynamic interaction has developed between judges, the bodies for judicial self-government in the Dutch system and the Minister of Justice and Security,[6] revolving around claims of autonomy. The evolved framework of rule-of-law and NPM values for the judicial organization provides a theoretical "lens" for understanding this interaction and its outcomes.[7]

Although the reforms of the Dutch judicial organization have not escaped the attention of legal scholarship, integrated legal and contextual analyses are relatively scarce. Constitutional scholars have primarily focused on the meaning and guarantee of judicial independence in the new institutional constellation in which the Council for the Judiciary has a central position.[8] Socio-legal studies have addressed aspects of the functioning of the

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[4] The article's scope corresponds with the questionnaire presented in D. Kosar et al., 'The Rise of Judicial Self-Government: Changing the Architecture of Separation of Powers without an Architect. Questionnaire for the Network of Constitutional Experts' (ERC project No. 678375, Masaryk University, 2017). This article was written on the basis of a national report prepared for this ERC project.

[5] Judges' Code (*NVvR-rechterscode*), para 2.2.

[6] The Ministry of Justice and Security holds its current name since the fall of 2017. Between 2010 and 2017, the name of the Ministry was Ministry of Security and Justice, a name chosen to highlight the transfer of the police to the Ministry's sole sphere of competence. Before 2010, the Ministry was known as the Ministry of Justice. *See* https://www.parlement.com.

[7] *See infra*, A.II.

[8] *See* inter alia P.P.T. Bovend'Eert & C.A.J.M. Kortmann, RECHTERLIJKE ORGANISATIE, RECHTERS EN RECHTSPRAAK (2013); P.M. van den Eijnden, ONAFHANKELIJKHEID VAN DE RECHTER IN CONSTITUTIONEEL PERSPECTIEF (2011); R. de Lange, *Judicial Independence in the Netherlands*, in JUDICIAL INDEPENDENCE IN TRANSITION (A. Seibert-Fohr ed. 2012).

judicial system from a more up-close empirical perspective, including investigations of the views and experiences of judges and court officials[9] and litigants.[10] Finally, (legal-)theoretical scholarship has provided conceptual and normative insights on the interplay of organizational values in the reforms of the judicial system[11] and the dynamics between key actors with competences for the government of the judiciary.[12] The analysis in this article aims to integrate insights from the available literature in its own multifaceted reflection on the Dutch reforms, in which attention will be paid to de facto as well as de iure developments. Based on its study of relevant legal sources and academic literature, this analysis will provide an in-depth overview which was not yet available and which will be able to inform a Dutch as well as an international readership on the values and practical challenges relating to judicial (self-)government in a contemporary state organized on the basis of the "rule of law" principle.

The structure of this article focuses on three aspects: shifts in, practical experiences with and constitutional repercussions of autonomy in judicial government. Firstly, the new forms and rationales of judicial self-government in the Netherlands which have emerged in the last three decades will be outlined in more detail (A). Secondly, attention will be given to the influence of changes in judicial self-government on the realization of the core values for the judiciary in institutional interactions and in the judiciary's connection to the society (B). Next, the analysis will address the influence of these reforms on the concretization of the constitutional principles of separation of powers and democracy in the Dutch system (C). In a brief concluding section, the main insights from this analysis will be summarized and a connection will be made with current European debates on judicial self-government, which are relevant to the Dutch judicial system too (D).

A. Forms and Rationales of Judicial Self-Government: Shifting Autonomy

For a proper understanding of judicial self-government in the Dutch legal system, it is necessary to study the reforms that have been initiated since the 1990s and the motives underlying these reforms. In particular, the year 2002 marked a key moment of change in

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[9] *See* inter alia P.M. Langbroek et al., *Performance Management of Courts and Judges: Organizational and Professional Learning versus Political Accountabilities*, in HANDLE WITH CARE: ASSESSING AND DESIGNING METHODS FOR EVALUATION AND DEVELOPMENT OF THE QUALITY OF JUSTICE (F. Contini ed. 2017); N. Holvast, IN THE SHADOW OF THE JUDGE (2017).

[10] H.A.M. Grootelaar & K. van den Bos, *How Litigants in Dutch Courtrooms Come to Trust Judges: The Role of Perceived Procedural Justice, Outcome Favorability, and Other Sociolegal Moderators* 52 LAW & SOCIETY REVIEW 234 (2018).

[11] G.Y. NG, QUALITY OF JUDICIAL ORGANIZATION AND CHECKS AND BALANCES (2007); E. Mak, *DE RECHTSPRAAK IN BALANS* (2007). *See* also M.A. Loth & E. Mak, *The Judicial Domain in View: Figures, Trends and Perspectives* 3(1) UTRECHT LAW REVIEW 75 (2007).

[12] A.F.M. Brenninkmeijer & H.A.M. Grootelaar, *De strijd om de rechterlijke macht* 12 RECHTSTREEKS (2016).

the architecture of the Dutch judicial organization, involving the establishment of more self-governing competences and a more hierarchical management structure for the courts (I) and the beginning of efforts to combine classic rule-of-law values with New Public Management values in the organization of the judicial system (II).

I. Forms of Judicial Self-Government: More Autonomy and More Hierarchy

The main actors with powers of self-government for the judiciary in the Netherlands are the Council for the Judiciary, the Management Boards of courts, and bodies with specific tasks, for example concerning the selection and the education of judges.[13] These actors can be classified as bodies for judicial self-government (JSG bodies), being "any expert body (in which a judge or judges sit) that has some powers regarding court administration and/or the career of a judge".[14] When considering the composition and competences of these bodies, the role of the Ministry of Justice and Security should be addressed as well. The particularities of the Dutch system come to the fore most clearly in a comparison of the system which was implemented in 2002 and the system which existed previously (see Figure 1). For a proper appraisal of the Dutch system of judicial self-government, the following analysis will also address the de facto balance of powers between the examined main actors.

Figure 1: Actors and competences in judicial self-government in the Netherlands

Time period: / *Competence:*	**Before 2002**	**Since 2002**
Negotiation of annual budget for the judiciary	Courts (director for court support) and Ministry of Justice and Security	Council for the Judiciary and Ministry of Justice and Security
Selection and appointment of judges	National Selection Committee and Ministry of Justice and Security	National Selection Committee and Ministry of Justice and Security
Development of directions and guidelines	National Consultation Bodies (LOVs) and Judges' Association (NVvR)	Council for the Judiciary, National Consultation Bodies (LOVs) and Judges' Association (NVvR)
Local court management	Judicial assemblies	Management Boards
Education and training of judges	National Training Center (SSR)	National Training Center (SSR)

[13] This analysis does not address the Public Prosecutor's Service, which is organized separately from the judiciary in the Netherlands and resides directly under the Ministry of Justice and Security.

[14] D. Kosar, *supra* note 4, 7.

The most prominent JSG body in the Netherlands is the **Council for the Judiciary** (*Raad voor de rechtspraak*), which started functioning on 1 January 2002. The Council currently has four members in accordance with the applicable law, which states that the Council is composed of at least three and at most five members. In case of a composition of three or four members, two should be judicial officers. In case of five members, three should be judicial officers.[15] The non-judicial members generally are persons with experience in public governance.[16] The members of the Council are appointed by Royal Decree on the recommendation of the Minister of Justice and Security from a list of six candidates at most, drawn up by the Minister in agreement with the Council. The recommendation needs to be approved by a committee composed of members from the judiciary.[17] In contrast with appointment procedures elsewhere in Europe, the judicial members of the Council are not selected solely by their peers. Criticism of judges on the functioning of the Council, which we will discuss in the next section, in part relates to this procedure and the "distance" it is thought to create between judges and the governing bodies for the judiciary.[18] Membership of the Council for the Judiciary is for a period of six years and can be renewed once for a period of three years. The chairperson of the Council is appointed from among the judicial members, also by Royal Decree and at the recommendation of the Minister of Justice and Security.[19] In case of a Council composed of four members, such as the one that is currently in place, the chairperson holds a casting vote in order to ensure the predominance of the "judicial voice" in decisions taken.[20] The current chairperson, Judge Frits Bakker, has held this position since 1 July 2013.

The Council for the Judiciary is in charge of the administration of the ordinary courts of first instance for civil, criminal, and administrative cases (*rechtbanken*), the courts of appeal (*gerechtshoven*), and the two specialized highest administrative courts: the Central Appeals Tribunal (*Centrale Raad van Beroep*) and the Trade and Industry Appeals Tribunal

[15] Art. 84(2) and 84(4) Judicial Organization Act (*Wet op de rechterlijke organisatie*) as revised in 2011. Between 2002 and 2011, the Council had to be composed of five members. Flexibility in the number of members was introduced after the evaluation of the Council's first years of performance, based on a new estimation of the required capacity for fulfilling its tasks. *See Kabinetsstandpunt evaluatie Wet organisatie en bestuur gerechten en Wet Raad voor de rechtspraak (Modernisering rechterlijke organisatie)* (2007, https://www.rijksoverheid.nl).

[16] Incompatibilities, in particular political functions, are listed in Art. 84(6) Judicial Organization Act.

[17] Art. 85 Judicial Organization Act.

[18] *See infra*, B.I.1.2.

[19] Art. 84(3) and 84(5) Judicial Organization Act.

[20] Art. 87(3) Judicial Organization Act.

(*College van Beroep voor het bedrijfsleven*).[21] Not under the Council's administration are the Supreme Court (*Hoge Raad der Nederlanden*) and the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).[22] The reason for this is that these two institutions hold special positions in the Dutch constitutional system as the general courts of final appeal. Therefore, special arrangements have been made for their organization.[23]

The Council for the Judiciary is responsible for preparing the budget for the Council and the courts; allocating budgets from the central government budget to the courts; supporting operations at the courts; supervising the implementation of the budget by the courts; supervising the operation at the courts; and nationwide activities relating to the recruitment, selection, appointment, and training of court staff. The support and supervision of the operations at courts require that particular attention is paid to information systems; accommodation and security; quality of administrative and organizational procedures; personnel matters; and other facilities.[24] In the performance of its tasks, the Council may issue general directions to the Management Boards of the courts in so far as this is necessary for the proper operation of the courts.[25]

Another task of the Council for the Judiciary is the provision of support for activities of the courts aimed at achieving uniform application of the law and promoting legal unity. The Council is also tasked with advising the government and the States General (Lower House and Senate) on generally binding regulations and the policy to be pursued by central government in relation to the administration of justice. Advisory opinions of the Council are adopted after consultation with the courts.[26] In performing the aforementioned tasks, the Council is bound to a so-called "exception of independence", which means that the Council may not involve itself in the procedural aspects or substantive assessment of or the decision in a specific case.[27]

[21] The Central Appeals Tribunal, located in Utrecht, decides appeals in social security and civil service cases. The Trade and Industry Appeals Tribunal, located in The Hague, decides appeals in the field of social-economic administrative law and appeals for specific laws, such as the Competition Act and the Telecommunications Act.

[22] Art. 2 and 3 Judicial Organization Act.

[23] For the Supreme Court, a covenant outlines the Court's relationship with the Ministry of Justice and Security with regard to the operation of the Court (https://www.rechtspraak.nl). The Administrative Jurisdiction Division is governed as a part of the Council of State, beside the Advisory Division on legislation and governance.

[24] Art. 91 Judicial Organization Act.

[25] Art. 92(1) Judicial Organization Act.

[26] Art. 94 and 95(1) Judicial Organization Act.

[27] Art. 96(1) Judicial Organization Act.

At every court of first instance and court of appeal, there is a Management Board composed of three members, including a chairperson.[28] The chairperson has the title of president of the court. This person and one other member of the Management Board are judicial officers. The other member is a court official without judicial tasks. The members of the Management Board at each court are appointed by Royal Decree based on a nomination by the Minister of Justice and Security. Appointment is for a period of six years with a possibility of renewal for a period of three years at the same court. The Minister of Justice and Security bases his nomination on a recommendation provided by the Council for the Judiciary. The Council for the Judiciary has to hear the advice of the court's Management Board, including the view of the works council at the court (i.e. the representative council of employees within the court), before giving its recommendation.[29]

Prior to 2002, the management of each court was in the hands of all judicial officers at a court, forming together the judicial assembly (*gerechtsvergadering*). This assembly's competences were very limited in practice, as a director for court support (*directeur gerechtelijke ondersteuning*) affiliated with the Ministry of Justice was in charge of the operation at the court and budgetary issues.[30] In 2002, a model of "integral" management was introduced, in which judicial officers and directors of operations cooperated. This model reflects the contemporary interpretation of the separation of powers, in which judicial independence encompasses the substantive as well as the organizational position of the judiciary vis-à-vis the other branches of government.[31] In this model, the Management Board consisted of a chairperson (the president), the chairpersons of the sectors within the court (e.g. the sector for civil cases, the sector for criminal cases, the sector for administrative cases, the sector for small claims (*kantonrechter*)), and a non-judicial member (director of operations).[32] The director of operations is no longer a civil servant at the Ministry of Justice, but has the status of a court official.[33] The judicial assembly still exists in this new structure, but it only has an advisory competence with regard to the court management.[34] This governance structure was fine-tuned in 2013, when a reform of the judicial map in the Netherlands took place. From 1 January 2013, the 19 district courts were reorganized into ten and eventually 11 district courts, and the five courts of appeal were reorganized into four courts of appeal. At that time, the internal

[28] Art. 15(1)-(3) Judicial Organization Act.

[29] Art. 15(4)-(5) Judicial Organization Act.

[30] Commissie Leemhuis 1998, *supra* note 2, 22-23.

[31] *Ibid*., 8-10.

[32] Art. 15 (old) Judicial Organization Act.

[33] Art. 15(2) Judicial Organization Act.

[34] Art. 22(1) and 28 Judicial Organization Act.

organization of courts changed as well: sectors became departments, and the Management Boards were redesigned into smaller and arguably more efficient governing bodies.[35]

The Management Boards at the courts are obliged to establish three types of regulations.[36] Firstly, each Management Board needs to establish an internal regulation, containing rules about the working methods, decision-making and division of tasks of the board; authorizations to board members to perform specific tasks; and the replacement of board members in case of illness or other obstacles to the performance of their duties. Secondly, each Management Board should establish a governance regulation, which addresses the court's organizational structure; the division of the court into chambers (encompassing one-member and three-member panels); the allocation of cases to the chambers; the way in which the Management Board will perform tasks relating to the operation of the court; and the external contacts of the Management Board. Thirdly, each Management Board will have to establish a regulation for the allocation of cases, setting out for each hearing location in the court's jurisdiction which categories of cases will be dealt with at that location. In establishing this regulation, the Management Board has to take into account the guarantee of access to justice. The three regulations for each court require the confirmation of the Council for the Judiciary. However, the Council can only withhold its confirmation in case of a violation of the public interest, which includes the interest of good access to justice, and the interest of good operations of the court.[37]

Within the framework of the established regulations, the Management Board of a court is charged with the day-to-day management, organization and operations of the court. In particular, the Management Board is responsible for information systems; preparation, adoption and implementation of the budget; accommodation and security; quality of the administrative and organizational procedure of the court; personnel matters; and other facilities. In this context, the Management Board may issue general and specific directions to all officials working at the court.[38] In performing the aforementioned tasks and in giving directions, the Management Board may not involve itself in the procedural aspects or substantive assessment of or the decision in a specific case or categories of cases.[39] The Management Board is also tasked with the promotion of legal quality and the uniform

[35] Act on the Reform of the Judicial Map (*Wet Herziening gerechtelijke kaart*), Stb. 2012, 313.

[36] Art. 19(1), 20(1), and 21a(1) Judicial Organization Act.

[37] Art. 21a(2) Judicial Organization Act.

[38] Art. 23(1) and 24(1) Judicial Organization Act.

[39] Art. 23(2) and 24(2) Judicial Organization Act.

application of the law, again within the boundaries set by the "exception of independence".[40]

Several other JSG bodies hold specific competences. An important observation is that the Council for the Judiciary has an influential position in many of these bodies. The National Selection Committee for the Judiciary (*Landelijke Selectiecommissie Rechters*) is tasked with the selection of new judicial officers and supplementary judges (*rechter-/raadsheer-plaatsvervanger*).[41] The Committee is composed of 22 members, including a Praesidium of four members, 12 members, and six supplementary members. These members represent the judiciary as well as a variety of societal sectors, including public governance, business, education and science, law firms, and the public prosecutor's service. Members are appointed by the Council for the Judiciary based on a selection made by the Committee itself, taking into account experience with recruitment, selection and/or education of judges and competences such as perception and integrity.[42] Appointment is for four years for members of the Praesidium. It is for three years for other members and in exceptional cases can be renewed for one year at the advice of the Committee's Praesidium.[43]

New judges are appointed on the basis of a selection procedure which is organized by the National Selection Committee in cooperation with the court where a vacancy exists. The Dutch judiciary currently counts approximately 2.300 judicial officers, who handle around 1.6 million cases per year.[44] In order to become a judge, candidates need to have the Dutch nationality and they need to have obtained a university degree with *effectus civilis*, meaning that a certain number of academic legal courses have been completed. Usually, this requires the completion of a bachelor's and a master's degree in law.[45] Furthermore, candidates will need to have obtained at least two years of relevant work experience outside of the judiciary and be of impeccable behavior, that is: not have received any criminal convictions.[46] Selected candidates will be appointed after successfully completing

[40] Art. 23(3) Judicial Organization Act.

[41] Art. 8(1) Regeling Landelijke selectiecommissie rechters (LSR). A supplementary judge has his or her main occupation elsewhere (e.g. as a university professor) and acts as a judge on a temporary basis (e.g. one day per month) based on the required capacity at the court where the supplementary judge has been appointed.

[42] Art. 2(1)-(4) Regeling LSR. *See* also https://www.werkenbijderechtspraak.nl/lsr.

[43] Art. 5(1) and 5(2) Regeling LSR.

[44] https://www.rechtspraak.nl.

[45] *Convenant inzake Civiel Effect* (22 March 2016, https://www.advocatenorde.nl). *See* also De Lange 2012, *supra* note 8, 240.

[46] Art. 1 Act on the Legal Position of Judicial Officers (*Wet rechtspositie rechterlijke ambtenaren*).

the education and training program for new judges. The statutory retirement age for judges is 70 years of age.[47]

The Training and Study Center for the Judiciary (SSR) organizes the initial training for judges and public prosecutors as well as courses in the framework of permanent education.[48] The Center was established in 1960. It engages also in international activities, notably as one of the co-founders of the European Judicial Training Network (EJTN).[49] Also in judicial training, a concentration of power comes to the fore in the chosen governance structure. The national Training and Study Center is owned by the Council for the Judiciary,[50] which has shared this ownership with the Public Prosecutor's Service on the basis of a mutual wish to cooperate. A Board of Owners, composed of one representative of each of these two institutions, decides on the substantive and budgetary frameworks for the operations of the Centre. The daily governance of the Centre has been mandated to an Executive Board composed also of representatives of the two involved institutions. The Management Boards at the courts and the National Consultation Bodies (to be discussed next) provide input on the "products and services" to be offered by the Centre. Judges, public prosecutors and academics act as lecturers and trainers in the provided courses.[51]

For the main fields of competence of the ordinary courts, National Consultation Bodies have been established (*Landelijk overleg vakinhoud, LOV*). These consultation bodies are composed of representatives of all of the courts of first instance and courts of appeal. They develop guidelines for judges, for example on sentencing in criminal cases or alimony in divorce cases. The National Consultation Bodies have played a prominent role also in the development of professional standards for the judiciary in 2016 and 2017.[52]

The Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*) is the professional organization and trade union for judges and public prosecutors in the Netherlands. It was founded in 1923.[53] Approximately 70% of the judges are members of this association.[54] The general assembly is the central organ of the association. It establishes policies, which are implemented by a board composed of five to seven

[47] Art. 117(2) Constitution.

[48] https://www.ssr.nl.

[49] http://www.ejtn.eu.

[50] Art. 40 Decree on the Financing of the Judiciary (*Besluit financiering rechtspraak 2005*).

[51] http://www.ssr.nl.

[52] https://www.rechtspraak.nl. *See* also *infra*, C.II.

[53] http://www.nvvr.org.

[54] https://www.linkedin.com.

members.[55] A bureau is available to assist members in achieving the optimal performance of their tasks. Special committees prepare advice on topics which are relevant to the association's members, such as advice on law reforms concerning the judiciary, advice on the legal position of judges, and advice on international activities.[56]

In this new landscape of judicial self-government, the most powerful actor de facto is the Council for the Judiciary.[57] The Council for the Judiciary has obtained a particularly powerful position in the area of court administration, including the budgeting for the courts. Although other bodies are in the lead in the area of judicial appointments and careers, the Council for the Judiciary can exercise power in this area as well, in particular through the appointment of members of the National Selection Committee for the judiciary.

II. Rationales of Judicial Self-Government: The Rise and Limits of New Public Management

The most significant change to judicial self-government in the Netherlands has occurred at the beginning of the 21st century. The major reform of the judicial organization at that time, which included the establishment of the Council for the Judiciary and of "integral management" in the courts can be traced back directly to the influence of New Public Management theories on the judicial organization. Further developments based on the same rationality concern the reform of the judicial map and the reform of the Management Boards of the courts, which have taken effect on 1 January 2013.[58]

Core values promoted by theories of New Public Management are: effectiveness, efficiency, and a client-oriented system.[59] These values were prominent in reforms of the public institutions in the Netherlands towards the end of the last millennium. In this regard, a governmental concern to reduce the costs for upholding the public sector arose in the 1990s alongside increased societal demands of celerity, affordability, and quality of judicial proceedings.[60] The new design of judicial self-government was intended to cater to these demands. In particular, the Council for the Judiciary and the Management Boards of the courts embody a more "business-like" model, in which small governing units set goals

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[55] Articles 6 and 7 of the Statutes of the NVvR, available at http://www.nvvr.org.

[56] http://www.nvvr.org.

[57] *See infra*, B.I.1.2.

[58] *See supra*, A.I.

[59] Mak, *supra* note 11, 33-36.

[60] On this trend more generally, *see* M. Barzelay, *Origins of the New Public Management. An International View from Public Administration/Political Science*, in NEW PUBLIC MANAGEMENT. CURRENT TRENDS AND FUTURE PERSPECTIVES (K. McLaughlin, S.P. Osborne & E. Ferlie eds.2002), 15.

and monitor the performance of the professionals who work in the organization on the basis of these goals. The Agenda for the Judiciary, developed by the Council for the Judiciary every couple of years, demonstrates that policy priorities are set with an eye to improving the realization of values connected with the principle of the rule of law as well as with New Public Management values.[61] An important current project in the Quality and Innovation Programme (KEI) is a good illustration of the interplay between these values. The digitalization at the courts aims to realize more comprehensible and quicker procedures, inter alia in order to keep a judicial "market share" in the competition with (digital) alternatives for dispute resolution. At the same time, this digitalization serves the guarantee of access to justice, for example by putting aside a possible obstacle relating to a litigant's geographical proximity to a court.[62]

An important base line in this new organizational model is that the core values connected with the principle of the rule of law, in particular the independence and impartiality of the judiciary, should remain safeguarded. This requirement entails that organizational measures aimed at the realization of NPM values are not allowed if these measures endanger the independent and impartial administration of justice. Both types of values come together in a new definition of the "quality" of the judicial system.[63]

From a different angle, the incentive to reform the judicial organization was prompted by shifts in the balance of powers between the three branches of government. This change is visible in particular in the development of administrative judicial review in the Netherlands. As a result of this development, questions arose which touched upon the reconceptualization of rule-of-law values while at the same time acknowledging the demand for the realization of NPM values. The judicial review of administrative action had developed historically in a fragmented manner, resulting in an incoherent and non-transparent system of laws and procedures. As a first step in the reform of this system, the archaic appeal to the Crown—meaning: the government—as a check on judicial review was abolished following two judgments of the European Court of Human Rights (ECtHR), in which the Court established a violation of Article 6 ECHR by the Netherlands.[64] Furthermore, organizational reforms of the Dutch Council of State were set in motion following the ECtHR's judgments in the case of *Procola v. Luxembourg*.[65] At the same time,

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[61] https://www.rechtspraak.nl.

[62] On the long and not always easy process of innovation, *see* D. Reiling, 'Court IT: we must, we can, but it's not easy' (blog Technology for Justice, 19 March 2018).

[63] Mak, *supra* note 1, 725.

[64] *Benthem v. the Netherlands*, Judgment of 23 October 1985, Appl. No. 8848/80, Series A No. 97; *Van den Hurk v. the Netherlands*, Judgment of 19 April 1994, Appl. No. 16034/90, Series A No. 288. *See* De Lange 2012, *supra* note 8, 231-232.

[65] *Procola v. Luxembourg*, Judgment of 28 September 1995, Appl. No. 14570/89, Series A No. 326.

a general procedure for administrative judicial review was laid down in the General Administrative Law Act 1994 and administrative sections were established in the courts of first instance with the competence to conduct this judicial review.[66] These changes affected the reform of the judicial organization, for which a leading motive from the mid-1990s onwards was the creation of a coherent and efficient management model for civil, criminal, and administrative judicial decision-making. Still, change has not been realized in some respects. A rejected reform, with effects on the judicial organization, concerned in particular the envisaged integration of appeal in administrative cases into the ordinary court system.[67] At a more fundamental level, the rise of judicial review of administrative action had an influence on the conception of the judicial role in the balance of powers. Indeed, the traditional idea of a separation of powers, which underpinned the Dutch Constitution of 1815, was less and less reflected in the "checks and balances" that developed in practice between the judiciary and the legislative and executive branches. This change at the macro level of interaction between the three branches of government stimulated calls for increased self-government of the judiciary.[68]

All involved actors in the Dutch reforms seem to have focused their attention on the quality of the justice system rather than on specific interests or claims to power. Therefore, theories which explain the rise of judicial self-government on the basis of power plays, e.g. insurance theory, transnational networks theory, or external incentives theory,[69] do not seem to be applicable to the Dutch case. An exception might be the debate regarding the realization of more organizational unity in the administrative justice system. In this regard, plans for further reforms have met with severe criticism from the special highest administrative courts.[70] Although there are good reasons for maintaining the existing system, which operates in a satisfactory manner, the criticism from within the courts could also be interpreted as an attempt to protect vested interests.

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[66] De Lange, *supra* note 8, 232 and 234.

[67] 'Kabinet trekt wetsvoorstel Organisatie hoogste bestuursrechtspraak in' (Dutch government, press release 16 November 2016, https://www.rijksoverheid.nl).

[68] Commissie Leemhuis, *supra* note 2, 8.

[69] Kosar, *supra* note 4, 8-9.

[70] W.A.J. van Lierop, *Het komen en gaan van het wetsvoorstel Organisatie hoogste bestuursrechtspraak* 4, NEDERLANDS JURISTENBLAD (2017).

B. Influence of Judicial Self-Government on the Judiciary's Organizational, Political, and Societal Position: Autonomy in Practice

The reforms in judicial self-government have had an effect on the internal relations between judges and JSG bodies (I) and on the judiciary's institutional position in relation to the other branches of government (II). Furthermore, the judiciary's interaction with politics and the society has evolved in response to the increased demand for transparency of public institutions (III). As the analysis in this section will clarify, the demarcation of autonomy in judicial self-government has been a central issue in practical experiences with the reformed judicial organization and debates relating to these experiences.

I. Judicial Self-Government and the Organizational Framework: Independence and Accountability

A main concern after the reforms of the Dutch judicial organization has been to find an adequate balance between the increased managerialism on the basis of NPM values, expressed in particular in the competences of the Council for the Judiciary and Management Boards of the courts, and the autonomy of judges to reach individual decisions on case management. In this changed context, the space for maneuvering of individual judges needed to be redefined (1). Furthermore, the changes in judicial self-government highlighted a remaining possible weakness in the Dutch constitutional system, which concerns the control by the Minister of Justice and Security of the budget for the judiciary (2).

1. De Iure and De Facto Independence: Redefining the Individual Autonomy of Judges

The development of the meaning of judicial autonomy in the new model for judicial self-government has given rise to critical analyses and to the codification of professional-ethical guidelines for judges on how to handle the new organizational demands (1.1). Furthermore, the practical experiences with the new organizational framework have led to critical outbursts from judges against the Council for the Judiciary on several occasions, demonstrating an increase of clashes between judicial actors in the new model of self-government (1.2).

1.1 Tensions in the Legal Framework: How Far Should Organizational Awareness of Judges Go?

Judicial independence is not explicitly guaranteed in the Dutch Constitution. The Constitution does contain general stipulations, including the appointment of judges for life—that is: until 70 years of age—and the requirement that statutory law will regulate the establishment of courts and the procedures for the suspension and dismissal of judges.[71]

[71] Art. 116 and 117 Constitution.

An important premise in the Dutch judicial system is that admission to the judicial office is merit-based. Based on this premise, political views or affiliations as well as religion or personal beliefs are not to be considered as criteria in the appointment or promotion of judges.[72]

Article 6 ECHR has been very influential in the Dutch system and the ECtHR's interpretation of "judicial independence" is generally accepted, that is: a definition which involves the test of whether a tribunal meets standards regarding "the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence".[73]

The change of judicial self-government has had an effect on the de iure independence of the Dutch judiciary and its individual judges. A positive aspect was considered to be the strengthening of the position of the judiciary in relation to the executive power through the creation of the Council for the Judiciary. The idea was that the Council would function as a "buffer" between the courts and the executive branch of government, for example by taking care of the annual budget negotiations with the Minister of Justice and Security.[74]

The Judges' Code, a code of conduct for the Dutch judiciary adopted by the Dutch Association for the Judiciary in 2011, provides the following definition of judicial independence:

An independent court system is not a privilege of the magistrate but a fundamental right of citizens in a democratic state governed by the rule of law. … An independent court system guarantees that the judge's decision is made free from social, economic, or political pressure, and that it is based on the judge's own assessment of the relevant facts and legal foundations in a specific case.[75] [my translation—EM]

The Judges' Code directs judges to be led by the law and by their own conscience and sense of justice, while taking societal developments and views into account when this is appropriate. The basis for judicial decisions should be the independent assessment of relevant facts and the interpretation of case law and legislation. Judges should be aware that certain cases require professional courage from the judge in order to reach a decision that the judge deems just, even if this decision does not have the broad support of the

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[72] M.F.J.M. de Werd, DE BENOEMING VAN RECHTERS: CONSTITUTIONELE ASPECTEN VAN DE TOEGANG TOT HET RECHTERSAMBT IN NEDERLAND EN DE AMERIKAANSE DEELSTAAT NEW YORK (1994).

[73] *Yakis v. Turkey*, Judgment of 25 September 2001, Appl. No. 33368/96. *See* De Lange, *supra* note 8, 233.

[74] *Kamerstukken II* 1999/2000, 27182, no. 3, 11. *See* also De Lange, *supra* note 8, 264.

[75] Judges' Code, para. 2.1.

society.[76] The Judges' Code clarifies that the independent functioning of the judiciary can only be achieved if the constitutional and legal guarantees relating to the position of the judiciary vis-à-vis the parliament and government are respected. For the legislative branch of government, this entails a duty to adopt laws which are reviewable and manageable. Furthermore, the three branches of government should show respect to each other in the fulfillment of their roles.[77] These guidelines aim to ensure that judges have functional (or substantive) independence, meaning that no other influences than the applicable legal sources can be binding on judicial decision-making in concrete cases.[78]

A problematic aspect for the guarantee of functional independence is that the new hierarchy in court administration has led to perceived constraints on procedural decisions by judges. In particular, the Council has put into place a model containing detailed "production norms", the so-called Lamicie norms.[79] In this model, cases are classified based on their complexity. Time for handling cases is then allotted on the basis of this classification. The number of cases to be decided is laid down in an annual "production agreement".[80] This model has been perceived as a restriction on the autonomy of judges within the judicial organization. Indeed, the implementation of the model could have as a consequence that judges take procedural decisions based on economic considerations rather than considerations concerning the guarantee of a "fair trial": is it worthwhile to hear extra witnesses in a trial if this would mean that the allotted time for the type of case at hand is exceeded? In this respect, a field of tension has developed between the interest of effective and efficient judicial government and the value of judicial independence.[81]

This tension between judicial government and judicial independence resounds in the Judges' Code. Besides the classic core values of independence, impartiality, professionalism, and integrity, this Code mentions the value of autonomy as a separate core value for judges. The Code defines this value as follows:

Autonomy of the judge on the one hand gives him the necessary freedom in his judicial functioning and on the other hand makes him fully responsible for this functioning.

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[76] Id.

[77] Id., para. 3.1.

[78] H. FRANKEN, ONAFHANKELIJK EN VERANTWOORDELIJK (1997), 13. *See* also R. de Lange & P.A.M. Mevis, *Constitutional Guarantees for the Independence of the Judiciary*, in *NETHERLANDS REPORTS TO THE SEVENTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* (J.H.M. van Erp & L.P.W. van Vliet ed. 2006), 327.

[79] P. van der Knaap & R. van den Broek, *Recht van spreken. Een resultaatgericht sturingsmodel voor de rechtsprekende macht* 7 BESTUURSKUNDE 313, 319-320 (2000).

[80] De Lange, *supra* note 8, 236. *See* further *infra*, B.I.2.

[81] R. ROBROEK, DE MACHT OVER HET STRAFPROCES (2016).

Autonomy, also sometimes called internal independence, concerns the scope for maneuvering of the judge within his organization. The judge gives shape to his autonomy through his sensible performance and independent capacity for judgment while he forms part of an organization which has to meet demands of efficiency and legality.[82] [my translation—EM]

1.2 Clashes in the Judicial Practice: The Council for the Judiciary under Fire

In practice, the change of judicial self-government in the Netherlands has not led to proven interferences with the independence of the judiciary or individual judges. However, the role taken up by the Council for the Judiciary has been observed with apprehension by a considerable number of judges. A clear sign of concerns about the Council's performance was given with the publication of the so-called Leeuwarden Manifesto in December 2012. This Manifesto was drafted by a number of judges at the Court of Appeal of Leeuwarden. The Manifesto was eventually supported by 700 judges, i.e. one quarter of the total number of judges in the Netherlands.[83] Newspapers and other media paid attention to the document and to responses from key players in the Dutch judiciary, such as the then-President of the Supreme Court, Geert Corstens.[84] When analyzing the content of the Manifesto and further debates which have ensued about this, the demarcation of autonomy comes to the fore as the central point of concern: autonomy of judges in relation to the Council for the Judiciary and autonomy of the Council in relation to the Ministry of Justice and Security. Although some points of criticism can be considered as fair with an eye to the guarantee of judicial independence, other points of criticism seem to relate more to the process of adjustment to the new organizational architecture.

The Manifesto criticized the performance of the Council for the Judiciary on three points. The Manifesto asked the Council for the Judiciary and the Management Boards of the courts to take measures in order to tackle these concerns. Firstly, the judges supporting the Manifesto did not feel represented by the Council for the Judiciary. They considered that the members of the Council are very far removed from the courts, while the Council operates in a constant dialogue with political actors, in particular with the Minister of Justice and Security.[85] Related criticism concerned the composition of the Council, which encompasses members who do not perform judicial tasks anymore or have no judicial experience at all, and the very limited involvement of judges in the procedure for selection

[82] Judges' Code, para. 2.2.

[83] Leeuwarden Manifesto (*Manifest van Leeuwarden*). *See* also M. Fikkers et al., *Het Manifest van Leeuwarden: vijf jaar na dato* 1024 ARS AEQUI (2017).

[84] J. Seegers, 'Hoogste rechter van Nederland luidt in brief noodklok over werkdruk' (*NRC Handelsblad*, 4 February 2013), supporting concerns about the workload of the courts.

[85] Leeuwarden Manifesto.

and appointment of these members.[86] In a response to this criticism, the Council for the Judiciary has organized meetings at all the courts and implemented regular consultations with courts in order to establish better communication. As a legitimization of its composition, it referred to the intention of the legislator on establishing the Council.[87] Although this response can be considered adequate, the realization of effective and transparent communication in practice remains a possible weak point. This became clear again, for example, in 2015, when the Council for the Judiciary expressed the intention to close down court locations in less densely populated areas in the Netherlands without consulting judges first. The protests organized by judges, lawyers and citizens who would be affected by this measure led to it being postponed and eventually cancelled.[88]

Secondly, criticism in the Manifesto addressed the temporary appointment procedure for new court presidents, relating to the reform of the judicial map.[89] According to the judges supporting the Manifesto, this procedure was seriously flawed: in most cases only one candidate was presented to the local advisory committee, giving the Council the power to determine by itself who were going to be the new court presidents. The supporters of the Manifesto feared that the new court presidents, who all met function profiles drafted by the Council for the Judiciary, would be unable to act as a proper counterweight to the Council in issues regarding the administration of the courts. In its response, the Council denied that it had orchestrated the appointment of the new court presidents.[90] For this point too, adequate lines of communication seemed a main point that needed to be addressed.

Finally, the supporters of the Manifesto claimed that the assessment of judicial performance had come to emphasize output too much.[91] The judges considered that the more centralized and "business-like" approach to court administration marginalizes the judicial function to a product, which can be managed on the basis of quantified output. In this environment, there is a risk of overrating the statistical performance of judges in individual assessments rather than appreciating the quality of the judicial work, a judge's commitment, and specific personal characteristics. According to the drafters of the Manifesto, the application of the model of "production norms" had resulted in an atmosphere in which cases do not receive the required attention anymore and in which judges make irresponsible choices in order to meet these norms.

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[86] Ibid. *See* also *supra*, A.I.

[87] Council for the Judiciary, 'Brief van de Raad voor de rechtspraak aan iedereen werkzaam in de Rechtspraak over de voorlopige opbrengst van de dialoog tussen Raad en gerechten' (21 February 2013).

[88] E. Jorritsma, 'Toga-protest leidt tot uitstel sluiting rechtbanken' (*NRC Handelsblad*, 9 September 2015).

[89] Leeuwarden Manifesto.

[90] Council for the Judiciary 2013, *supra* note 87.

[91] Leeuwarden Manifesto.

Prompted by the Manifesto, the Council for the Judiciary commissioned research on the perceived workload in the courts.[92] This research confirmed that the perceived workload among judges is high. Identified causes are the high number of cases and the number of extra hours worked in combination with the experienced bureaucratization within the judicial organization, and the loyalty of judges in the sense of wanting to meet the organizational goals set regarding quality and efficiency.[93] Still, the Council expressed the opinion that the discomfort of the judges supporting the Manifesto had a deeper cause, relating to the increased demands on the judiciary from politics and the society, political and societal criticism of the performance of the courts (e.g. in some instances of erroneous convictions in criminal cases[94]), and the scarce public resources which are available for the judiciary.[95] This debate reveals a tension which is hard to solve, i.e. the aim of realizing a high standard of quality in judicial procedures and their outcomes while being constrained by contextual factors, in particular the available budget and human resources for the courts. It seems to be unavoidable that this tension expresses itself in the dynamics between the courts and the Council for the Judiciary once in a while, as it did previously in debates between the courts and the Ministry of Justice.

Five years after their call for action, in December 2017, the drafters of the Leeuwarden Manifesto considered that the Manifesto and the debate it generated have had positive consequences for the independent position of the judiciary. First of all, the Council for the Judiciary has given firmer shape to its role as a representative body of and for the judiciary, inter alia by giving more attention to the organizational requirements that enable judges to ensure the quality of procedures and judgments.[96] Moreover, the procedure for the appointment of court presidents has been adapted in order to enhance consultation at the local level of the courts with regard to the recommendation of candidates.[97] Still, at least one fundamental point of criticism has not been addressed. This concerns the budgeting for the courts.

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[92] B. FRUYTIER ET AL., WERKDRUK BEWEZEN: EINDRAPPORT WERKDRUKONDERZOEK RECHTERLIJKE MACHT (2013).

[93] Ibid., 85; M. Husken & H. Lensink, 'Het grote VN-onderzoek: de rechter geeft zich bloot' (*Vrij Nederland*, 14 December 2013).

[94] *See infra*, B.III.1.

[95] Council for the Judiciary 2013, *supra* note 87.

[96] Fikkers et al., *supra* note 83, 1024.

[97] Ibid., 1026.

2. Judicial Self-Government and Judicial Accountability: A Weakness in the Constitutional System?

An alleged weakness in the current model for judicial self-government remains the dependency of the available budget for the judiciary on developments in the political agenda.[98] In the past five years, the economic crisis in the Netherlands has led to a decrease of the available total budget for the judiciary. The Minister of Justice and Security has used this decrease as a justification for reassessing the available budget for the judiciary as a part of the Ministry's total budget and taking into account the expected influx of cases and the time used by judges for handling cases. This approach was criticized by the Council for the Judiciary,[99] the Court of Audit (*Algemene Rekenkamer*),[100] and judges from Utrecht and Lelystad (Tegenlicht group) who drafted a "Manifesto 2.0" based on input from one-third of the judges in the Netherlands.[101] Their concern is that financing based on the available budget will endanger the quality of judicial performance in economic "hard" times and that the judiciary will be reduced to an executive organ of the Ministry of Justice and Security. This concern relates to the perceived constraints on the autonomy of judges because of the incentive to relate procedural decisions to the Lamicie model.[102] A way to loosen the Minister's grip on the finances for the judiciary would be to grant the judiciary the constitutional status of High Council of State, which is a status already held by the First and Second Chambers of Parliament, the Council of State, the Court of Audit, and the National Ombudsman.[103] Yet, the lower chamber of Parliament in October 2016 rejected a slightly less far-reaching amendment for financing of the judiciary based on a non-departmental budget plan.[104] The drafters of the Leeuwarden Manifesto observed in December 2017 that no changes to the status quo appear likely in the near future.[105] This view was confirmed in early April 2018, when the same amendment after a resubmission again did not get accepted.[106] It had received public support from the judges of the Tegenlicht group, who claimed: "Ultimately, the judiciary is the sole pillar of the trias

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[98] Ibid., 1026-1027.

[99] F.C. BAKKER, JAARVERSLAG RECHTSPRAAK 2015 (2015).

[100] COURT OF AUDIT, RAPPORT BEKOSTIGING RECHTSPRAAK: GEVOLGEN VOOR DOELMATIGHEID (2016).

[101] 'Resultaten enquête Tegenlicht: de rechterlijke organisatie tegen het licht' (https://www.rechtspraak.nl). *See* also Fikkers et al., *supra* note 83, 1026-1027.

[102] *See supra*, B.I.1.

[103] Bakker, *supra* note 99; Fikkers et al., *supra* note 83, 1026.

[104] *Kamerstukken II*, 2016/17, 34426, no. 9.

[105] Fikkers et al., *supra* note 83, 1027.

[106] *Kamerstukken II*, 2016/17, 34618, no. 2.

politica which does not have its own budget. This is fundamentally incorrect" [my translation—EM].[107]

Despite this criticism, arguments in favor of the current institutional arrangement can be found in the "checks and balances" which exist in the Dutch constitutional system. A reason for upholding the current arrangement might be that this arrangement does involve other political actors and in this way provides for a check on the allocation of budget to the judiciary by the Minister of Justice and Security. Based on the applicable laws, the judiciary is financially accountable to the Parliament. The Council for the Judiciary annually establishes a report on behalf of all courts of first instance and courts of appeal, outlining the financial management of the Council and the courts in the preceding budget year and the way in which the work for which the budget was allocated has been carried out. This report is sent to the Minister of Justice and Security, who must forward it to both Chambers of Parliament. An auditor designated by the Council, but whose work can be checked by the Minister of Justice and Security, must give an opinion regarding the accuracy and regularity of the accounts.[108] Besides this argument of principle relating to the "checks and balances" of the system, it is questionable whether a non-departmental budget would solve the practical problem of perceived pressure among judges to meet "production norms" based on the Lamicie model.

Difficulties relating to the practical implementation of the budget plan come to the fore when we have a closer look at the framework of legal rules and regulations and the de facto experiences with this framework. The Council for the Judiciary supervises the implementation of the annual budget plan by the courts. It also supervises the operation of the courts.[109] The Decree on the Financing of the Judiciary 2005 specifies that the Minister of Justice and Security makes funding available to the Council for the Judiciary, which the Council then distributes among the courts. In order to fine-tune the budgeting system, the Council measures the "production", "(local) prices", and "workload" in the courts on the basis of the Lamicie model, which categorizes types of cases based on their complexity.[110] The Council for the Judiciary is accountable to the Minister of Justice and Security for processing an agreed upon number of cases per budget year. In the practice within the courts, the main weakness of this model has manifested itself. Already in the reform debates, the fear was expressed that the Lamicie model would stimulate calculated behavior with regard to procedural decisions.[111] Experiences in the practice of the past 16

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[107] R.M. Berendsen et al. (group Tegenlicht), 'Opinie: Geef de rechtspraak eigen begroting' (*De Volkskrant*, 26 March 2018).

[108] Art. 104(1)-(5) Judicial Organization Act.

[109] Art. 91(1)(d) and 91(1)(e) Judicial Organization Act.

[110] Art. 2-4 Decree on the Financing of the Judiciary.

[111] *See supra*, B.I.1.1.

years demonstrate that this fear was warranted, in the sense that considerations on the available budget have become more prominent in decisions of judges, e.g. on the use of limited time for court hearings, and Management Boards, e.g. on the use of single- or three-judge panels.[112] An incentive for this behavior among judges is not so much the system of promotion and dismissal, which can have only a minor impact on one's individual position. Indeed, the possibilities for promotion are limited to only a few functions (e.g. senior judge, court (vice-)president, transfer to a higher court) and require many years of experience. Disciplinary measures are currently limited to a reprimand or dismissal and application of the latter measure, which can only take place through a procedure led by the Prosecutor General at the Supreme Court, is very rare.[113] Instead, calculated behavior seems to stem to a greater extent from the intrinsic desire of judges to create as much time as possible for the handling of cases in accordance with high standards of professionalism, if need be by "gaming the system" in order to secure for their court a larger share of the available budget.[114]

Further insights on the accountability of the Council for the Judiciary can be gained from an analysis of the system of supervision of its functioning. Indeed, the Council for the Judiciary does not have absolute autonomy regarding the administration of the judiciary. The Judicial Organization Act provides for a detailed system of supervision. Still, in the practice so far this system – in particular the competences of the executive branch of government – has not played an important role. In the designed system, the Minister of Justice and Security holds the strongest constraining powers on the Council. The Minister can issue general directions to the Council on the performance of its duties aimed at the proper operation of the courts. The Council has a right to present its view on the intended general directions and can prevent these directions from being issued if they would infringe the "exception of independence", which holds that the Minister in exercising his legal powers "may not involve himself in the procedural aspects or substantive assessment of or the decision in a specific case or category of case".[115] As another restriction on judicial self-government, the Minister of Justice and Security can set aside a decision of the Council for the Judiciary by Royal Decree if this decision is "manifestly contrary to the law or prejudicial to the proper operation of the courts".[116] The Council for the Judiciary has an obligation to provide the Minister of Justice and Security, at the Minister's request, with

[112] Robroek, *supra* note 81.

[113] Art. 116(4) and 117(4) Constitution and Chapter 6A Act on the Legal Position of Judicial Officers. A reform is underway to allow for more variety of disciplinary measures, including a cut in a judge's salary in case of insufficient performance.

[114] Robroek, *supra* note 81.

[115] Art. 93(1)-(4) and art. 109 Judicial Organization Act.

[116] Art. 106(1) Judicial Organization Act.

the information required to perform his duties regarding the supervision of the Council.[117] Weaker constraining powers are held by the Board of Delegates, which consists of representatives of the courts, the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal. This Board of Delegates gives solicited or unsolicited advice to the Council for the Judiciary regarding the performance of the Council's tasks. The Council must provide the Board with requested information needed by the Board to perform its duties.[118]

As this analysis makes clear, key challenges regarding the guarantee of judicial independence in the Netherlands concern the balancing of NPM values and rule-of-law values with regard to the judicial organization. A further increase of the workload of individual judges, related to budget cuts, could eventually undermine the guarantee of the independent administration of justice. In this regard, it is essential that a sphere of autonomy of individual judges is ensured in which they can realize the required standards of professional quality in judging. The current model of judicial self-government has put the Ministry of Justice and Security at a greater distance from the judiciary. In its place, however, the Council for the Judiciary has been given the difficult task of representing judges and meeting their professional needs, on the one hand, while being given the task to realize managerial policy goals based on a limited budget, on the other hand.

II. Judicial Self-Government and Politics: Independence in the Balance of Powers

An important conclusion based on the analysis in the previous section is that the functional independence of the Dutch judiciary and individual judges has—so far—not been affected negatively by the reforms of the judicial organization. Judges claim the autonomy needed to ensure that cases are decided based on sound procedures and without unlawful pressure on individual judges relating to organizational concerns. More generally, also the factual independence of the judiciary, as a prerequisite for the impartial administration of justice,[119] seems to be safeguarded in the Dutch legal system. Debates on factual independence and on impartiality are few. An analysis of selected relevant issues will clarify how the Dutch judiciary can be assessed in this regard and to what extent a relation to judicial self-government exists.

Historically, political threats to judicial independence in the Netherlands have been few. The period of German occupation of the Netherlands during World War II (1940-1945) is considered exceptional. During this period, the Jewish president of the Supreme Court was forced to step down and the retirement age for judges was lowered from 70 to 65 years of

[117] Art. 105 Judicial Organization Act.

[118] Art. 90(3) and 90(4) Judicial Organization Act.

[119] *See* Franken, *supra* note 78, 28.

age, allowing the occupying force to appoint Nazi judges in key positions.[120] In the rule-of-law framework which has developed since 1945, judges generally are much less afraid to reach judgments which might not please the government. Many examples of "judicial courage" can be identified, recently inter alia the order to the State to enhance efforts to reduce greenhouse gas emissions in the "climate case" initiated by the Urgenda Foundation;[121] the recognition of civil responsibility of the State to pay damages to relatives of 350 Muslim men who were taken away from the enclave Srebrenica—and murdered later—for the State's failure to protect these men under the UN Dutchbat mission in the former Yugoslavia;[122] and the recognition of civil responsibility of the State to pay damages to Indonesian widows and orphans for unlawful killings by the Dutch military in Rawagedeh during the Indonesian war of independence.[123] This professional attitude connects with the position of the judiciary in the balance of powers. Judicial independence from the other branches of government is safeguarded not only de iure but also de facto, providing a safe space for expressions of "judicial courage" in politically sensitive cases. Moreover, the conception of the judicial function itself has evolved and in it currently provides for a stronger role of the judiciary in the "public life" of the Dutch society.[124] Indeed, over time the view on the judicial function has increasingly become that judges should have a role in the development of the law, for example when interpreting "open norms" in legislation, and that the judiciary should act as a check on the executive power through the exercise of judicial review in administrative cases. Against this background, judges feel able and are called upon to perform a role which goes much further than being a mere "mouthpiece of the law" which applies legal rules to individual cases.[125]

In order to safeguard the impartial administration of justice, parties can request a judge to withdraw from their case or they can file for the recusal of a judge. The number of requests for recusal of judges has increased over the years, but remains limited. Most requests, which are decided by another judicial panel in the same court, are not granted.[126]

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[120] G. Corstens, 'Bescherm onze rechters tegen de politiek' (*NRC Handelsblad*, 9 January 2018). *See* also C. JANSEN & D. VENEMA, *DE HOGE RAAD EN DE TWEEDE WERELDOORLOG* (2012).

[121] *Urgenda Foundation v. State of the Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196.

[122] *Foundation Mothers of Srebrenica et al. v. State of the Netherlands*, Court of Appeal of The Hague, 27 June 2017, ECLI:NL:GHDHA:2017:1761.

[123] *Foundation Komite Utang Kehormatan Belanda et al. v. State of the Netherlands*, District Court of The Hague, 14 September 2011, ECLI:NL:RBSGR:2011:BS8793.

[124] D. Luban, *Settlements and the Erosion of the Public Realm* 83 GEORGETOWN LAW JOURNAL 2619, 2632 (1995).

[125] CH.-L. DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS (1973).

[126] W. VAN ROSSUM, J. TIGCHELAAR & P. IPPEL, WRAKING BOTTOM-UP. EEN EMPIRISCH ONDERZOEK (2012).

A few times, suspicions of judicial bias in specific cases have drawn attention from the media. A high-profile case was the Chipshol case about the development of land near Schiphol airport, in which Judge Hans Westenberg was accused of having unjustly favored one of the parties. This judge and a colleague, who both had been acquaintances of the party, were later prosecuted for perjury for denying their friendship. They were however both acquitted because of a lack of evidence.[127]

Some specific tensions in the safeguarding of judicial independence in institutional interactions can be identified in relation to the field of criminal law. In this field, the Minister of Justice and Security has the competence to give general directions to the Public Prosecutor's Service[128] and he can order the prosecution in specific cases.[129] In practice, the latter competence has however never been used. More significantly, a high degree of autonomy exists in the discretion granted to the Public Prosecutor's Service to choose which cases to prosecute (*opportuniteitsbeginsel*). This principle is generally accepted as serving the effectiveness and efficiency of the criminal justice system and is complemented by the right of individuals to demand the prosecution of an alleged criminal offence of which they have been the victim(s).[130] More problematic in light of the rule-of-law principle is the competence granted to the Public Prosecutor's Service to hand down criminal sentences for minor offences (*OM-afdoening*).[131] This procedure allows for an appeal to a district court. Still, legal scholars and lawyers have expressed criticism holding that the inherent barriers in this arrangement—i.e. the psychological barrier to continue the procedure, the practical barrier of extra costs—could endanger the effective protection of a defendant's right to a "fair trial" as protected by Art. 6 ECHR.[132]

As a notable area of concern, criticism was expressed some years ago, inter alia by first instance judges, on the approach of the Council of State in immigration and asylum cases.[133] The *Salah Sheekh* judgment of the European Court of Human Rights confirmed that the very formal approach of the Dutch highest administrative court—consisting of a review ex tunc and based only on government reports, not on report of NGOs, on the situation in the asylum seeker's country of origin—violated the right to a fair trial.[134]

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[127] 'Oud-rechters Kalbfleisch and Westenberg vrijgesproken van meineed' (*AD*, 23 November 2012).

[128] Art. 127 Judicial Organization Act.

[129] Art. 128 Judicial Organization Act.

[130] Art. 12 Code of Criminal Procedure (*Wetboek van Strafvordering*).

[131] Act on the Deciding of Cases by the Public Prosecutor's Office (*Wet OM-afdoening*).

[132] J.J. Crijns, *Het wetsvoorstel OM-afdoening: een wolf in schaapskledij* SANCTIES 225 (2004).

[133] K. GROENENDIJK, EEN VENIJNIG PROCES (2008).

[134] *Salah Sheekh v. the Netherlands*, Judgment of 11 January 2007, Appl. No. 1948/04.

However, this criticism was not directly connected with the model of judicial self-government, but rather with views on the scope of judicial discretion for reviewing administrative action.

Finally, there are a few examples of direct confrontations between the judiciary and political actors. A debate about the space for politicians to express public opinions about decisions of the courts arose after parliamentarians criticized the decision of the Court of Appeal in Arnhem to release Saban B., a defendant in a high-profile criminal case who then fled to Turkey.[135] Some politicians used this incident to argue for legislative reform to allow the easier dismissal of judges who have erred in judgments in specific cases. Responses from academia emphasized the importance of safeguarding the functional independence of judges, which includes space to make mistakes. The alternative, where judges can be fired for decisions taken, would lead to political influence on the courts which is not commensurable with the principle of the rule of law.[136]

In two recent cases, judges and politics clashed again. This time, Member of Parliament Geert Wilders criticized the impartiality of the judges allocated to the criminal cases in which he has been involved. In the first case, which concerned the allegedly offensive film *Fitna*, Wilders successfully requested the recusal of the presiding judge based on expressed empathy for applicants present in the courtroom. He was later acquitted in this case.[137] In the second case, the extreme right-wing politician was on trial for "hate speech" against the Moroccan community in the Netherlands, having promised his supporters "less Moroccans" during a political rally.[138] The court management, eager to anticipate criticism on the impartiality of the judicial panel, had selected judges who did not hold membership of a political party and had issued a press release to highlight this choice. This strategy raised criticism from legal scholars, as political membership of judges is not prohibited and judges are expected to be able to distance themselves from their own political or other beliefs when judging cases.[139] A further point of criticism raised by Wilders concerned comments made by one of the judges on the panel with regard to the previous trial against the politician. On this point, the judge considered that she could still handle the case impartially, taking her cues from the applicable criminal laws. The judge did not withdraw and a request for her recusal was unsuccessful.[140] Wilders was found guilty of "hate

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[135] A. Ellian, 'Politiek moet zich niet met rechters bemoeien' (*NRC Handelsblad*, 5 October 2009). *See* also P.M. LANGBROEK, ADMINISTERING COURTS AND JUDGES: RETHINKING THE TENSION BETWEEN JUDICIAL INDEPENDENCE AND ACCOUNTABILITY (2009).

[136] Ibid.

[137] District Court of Amsterdam, 23 June 2011, ECLI:NL:RBAMS:2011:BQ9001.

[138] District Court of The Hague, 9 December 2016, ECLI:NL:RBDHA:2016:15014.

[139] A. Korteweg, 'Politieke kleur van rechters speelt in Nederland geen rol' (*Volkskrant*, 13 March 2016).

[140] District Court of The Hague, 11 November 2016, ECLI:NL:RBDHA:2016:13520.

speech" but the District Court was mindful of the special circumstances surrounding the trial of a politician—presumably the Court was thinking of media attention for the case—and did not impose a penalty.[141] This case is currently on appeal, where Wilders requested the presiding judge to withdraw. He criticized her for left-wing political sympathy, allegedly demonstrated in the judge's chairpersonship of a committee which had awarded a master thesis prize to a student involved in the care for refugees. The judge did not grant this request, explaining that her very limited involvement with the student and her academic assessment of the master thesis could not cast doubt on her impartiality.[142]

Geert Wilders has also been critical of the judiciary in other ways, notably by challenging two appointments in the Supreme Court in 2011. The first time, this concerned Ybo Buruma, who was a professor of criminal law and had been actively involved in the elaboration of the Labor Party's political agenda.[143] The parliamentary committee which advices the Minister about the appointment of Supreme Court justices, based on a short list established by the Supreme Court,[144] ignored this criticism and gave a positive advice on the appointment of Buruma. The second time, Wilders was successful in obstructing the appointment of Diederik Aben as Advocate General at the Supreme Court. Aben had written a critical comment on the recusal of the judge in the first criminal trial of Wilders. For this reason, the politician framed Aben as "an apparently biased Advocate General [at the Court of Appeal of Amsterdam—EM] who in his spare time feels he has to defend his recused buddies".[145] In this case, the parliamentary committee was persuaded to not go through with the appointment and the Supreme Court obliged in changing its short list of candidates. The reason provided by the parliamentary committee was that this second challenge of an appointment in the Supreme Court within a relatively short time frame could damage public confidence in the highest court. This decision met with criticism, pointing out that political interests had been given priority over the merit-based criteria for judicial appointments.[146]

In sum, there are neither structural threats to judicial independence in the Netherlands nor exemplary measures which have been taken against specific judges. Still, the rise of populism and the increased polarization in political debates has led to occasional

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[141] District Court of The Hague, 9 December 2016, ECLI:NL:RBDHA:2016:15014.

[142] 'Reactie voorzitter gerechtshof op vraag Geert Wilders tijdens regiezitting' (press release, 26 October 2017, https://www.rechtspraak.nl).

[143] G. Boogaard, 'De benoeming van Buruma' (blog Publiekrecht & politiek, 10 March 2011, www.publiekrechtenpolitiek.nl).

[144] Art. 118(1) Constitution.

[145] F. Jensma, 'Hoe de PVV een raadsheer uit de Hoge Raad weerde' (NRC Handelsblad 17 December 2011).

[146] Ibid.

confrontations between the judiciary and politicians. This relatively stable position, honoring the rule-of-law principle, is underlined further by a mostly positive perception of the judiciary among the general public.

III. Judicial Self-Government and the Society: Legitimacy, Transparency, and Public Confidence

Already before the reforms of the judicial organization and since then too, the position of the Dutch judiciary in the society has generally managed to meet societal demands of legal, normative, and social legitimacy (1). Specific changes in judicial self-government can be classified as a response to the demand for transparency, which has become an increasingly important factor for securing public confidence in public institutions and connects with NPM values for organizational performance (2).

1. Legal, Normative, and Social Legitimacy: A Sound Basis

A brief reflection on the perceived legitimacy of the Dutch judiciary provides insight into the societal context in which the judiciary operates and, in this way, clarifies the background to the judicial system as it was established and has developed over time. Three dimensions of legitimacy can be identified.[147] In the legal dimension, firstly, the appointment and functioning of judges in the Netherlands take place in accordance with the applicable constitutional and legal rules. As the previous analysis has demonstrated, interaction between the organizational framework and decision-making in concrete cases has intensified.[148] The reform of judicial self-government has increased tensions in this regard. At the same time, this reform has prompted new initiatives from judges aimed at enhancing the quality of judicial decision-making for those seeking justice. For example, the National Consultation Bodies of judges (LOVs) have formulated guidelines to improve the guarantee of legal unity in specific types of cases.[149]

In the normative dimension of legitimacy, secondly, the organization and functioning of the Dutch judiciary can be assessed as mostly appropriate in connection with the principle of democracy and with moral values supported in the society. Not much public debate takes place on the quality of selection procedures and of appointed judges, the soundness of judgments, and the quality of procedures in terms of effectiveness and efficiency.[150] Yet, debates occur regularly on specific topics of judicial decision-making, for example the ability of judges to properly assess non-legal aspects in their decision-making. Academic

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[147] Kosar, *supra* note 4, 14-15.

[148] *See supra*, B.I.1.2.

[149] E.g. Sentencing Guidelines (*Oriëntatiepunten straftoemeting*) for criminal cases, https://www.rechtspraak.nl.

[150] *See supra*, B.

scholarship has connected with these debates in research on inter alia the assessment of complex evidence (DNA, statistical analyses, psychiatric reports) in criminal cases[151] and research on behavioral aspects of contract and tort law.[152]

In the social dimension, thirdly, the authority of the courts is for the most part accepted by different audiences, including political actors, judges, lawyers, academics, NGOs, and the general public.[153] There is a high level of trust in the Dutch judiciary, which steadily ranks at around 70%, higher than any other institution of government. In 2016, 67% of the Dutch population had sufficient trust in the judiciary, of which 44% had much or very much trust.[154] Furthermore, survey results on public confidence in the judiciary and other public institutions have demonstrated that the judiciary was the only institution for which a rise in public confidence occurred between 2008 and 2014 (see Figure 2, below, in which the trends for the judiciary and the lower chamber of Parliament are depicted).[155]

The reform of judicial self-government has not had a measurable effect on this level of public confidence. A likely reason for this is that citizens will not automatically connect their assessment of the authority of the courts—for example based on perceived procedural justice[156] or the perceived independence of the judiciary from politics—to changes in the judicial organization.

Occasional drops in the level of public confidence in the judiciary have occurred in response to highly mediatized erroneous convictions in criminal cases, such as the *Schiedammer Parkmoord* case (2004) or the *Lucia de Berk* case (2009-2010).[157] The evaluation of these cases led to the establishment of a Committee for the evaluation of closed criminal cases (*Commissie evaluatie afgesloten strafzaken*, *CEAS*, 2006-2012) and eventually to the competence of the Prosecutor General at the Supreme Court for a reassessment of closed criminal cases if this could be beneficial for the convicted person.

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[151] E.g. W.A. Wagenaar, H. Israëls & P.J. van Koppen, *De slapende rechter* (Amsterdam: Uitgeverij Bert Bakker 2009); T. Derksen, *Lucia de B. Reconstructie van een gerechtelijke dwaling* (Diemen: Veen Media 2006).

[152] W. van Boom & I. Giesen (eds.), *Civilology Book Series* (The Hague: Boom Juridisch 2011-).

[153] Yet, a recent critical report claimed that access to justice is not sufficiently guaranteed for all citizens: M. Barendrecht, K. van Beek & S. Muller, *Menselijk en rechtvaardig. Is de rechtsstaat er voor de burger?* (The Hague: HiiL 2017).

[154] The Netherlands Institute for Social Research (Sociaal en Cultureel Planbureau, SCP), *Culturele Veranderingen* (The Hague: SCP 2016), mentioned in SCP, *De sociale staat van Nederland 2017* (The Hague: SCP), 292.

[155] The Netherlands Institute for Social Research (SCP), *Continue Onderzoek Burgerperspectieven* (The Hague: SCP 2016).

[156] K. van den Bos, *Kijken naar het recht* (Utrecht University 2014), http://njb.nl/kijken-naar-het-recht.

[157] C. Brants, 'Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands' (2012) 80 University of Cincinnati Law Review 1069, 1090-1099.

Figure 2: Public confidence in the judiciary and the lower chamber of Parliament

The lowest levels of trust in the legal system, including the judicial system, since the year 2000 occurred at the beginning of the new millennium (see Figure 3).[158] It has been suggested that this decrease in public trust was related to the societal unrest surrounding the assassinations of right-wing politician Pim Fortuyn by an animal rights activist (2002) and film director Theo van Gogh by a Dutch-born Islamic extremist (2004).[159]

[158] Eurobarometer, http://ec.europa.eu.

[159] 'Hoeveel vertrouwen geniet de rechtspraak?' (2016), https://www.rechtspraak.nl.

Figure 3: Trust in the Dutch legal system (source: Eurobarometer)

2. Judicial Legitimacy in Context: The Contemporary Relevance of Transparency

The reform of judicial self-government in the Netherlands paid notice to increased demands for transparency of public institutions, including the judiciary. These demands can be connected to the influence of NPM values, which include a client-oriented approach. Arguably, transparency in the handling of cases and in communication with citizens can also enhance the effectiveness and efficiency of the judiciary.[160]

The Council for the Judiciary is in charge of the National Service Centre for the Judiciary (LDCR), which handles the publishing of information and ICT services for the courts. Information about the judicial organization and its functioning has been made more available to the general public and users of the judicial system, primarily on the website of the judiciary.[161] This website contains detailed information about judges, in particular a register of extra-judicial activities of judges, and a broad selection of anonymized judgments handed down by the courts. This website further contains information for the general public about the judicial system and about specific procedures as well as more specialized information for legal practitioners and academics, such as annual reports of the Council for the Judiciary and the Supreme Court, and public speeches held by the President

[160] D. BROEDERS ET AL., SPEELRUIMTE VOOR TRANSPARANTERE RECHTSPRAAK (2013).

[161] https://www.rechtspraak.nl.

of the Supreme Court. The Council for the Judiciary annually publishes a report which presents key figures on the quality of the judicial system (including the numbers of complaints and requests for recusal of judges), production and finances, and personnel and organization (including absences because of illness).[162]

An ongoing operation concerns the further digitalization of court procedures in the framework of the Quality and Innovation Programme (KEI) under the auspices of the Council for the Judiciary. Although the aim is to create more accessible procedures for litigants and lawyers, the process of implementation of ICT solutions has not run very smoothly so far and has given new input for discussions on judicial autonomy within the organization.[163] In April 2018, a consultation was started between the Council for the Judiciary and the Minister for Legal Protection (one of the current two Ministers of Justice and Security) with the aim of guaranteeing internal support within the judiciary for the process of digitalization and the aim of clarifying competences and responsibilities in the management structure for this process.[164]

The more hierarchical structure in judicial self-government, which connects with NPM values, manifests itself also in the current media policies for the judiciary. The chairperson of the Council for the Judiciary acts as the "face" of the judiciary in public debates which concern the judiciary as a whole, such as the current debate on the guarantee of the independent and impartial administration of justice in increasingly polarized societies.[165] In each court, selected judges are trained to act as "press judges", who have the task to provide a clarification of judgments handed down in high-profile cases. Furthermore, guidelines are available to courts on how to deal with the media.[166]

Current debate concerns the use of social media by courts and judges. Courts have accounts on Twitter, but use these accounts as a means for presenting information, similar to a website, rather than as a means for establishing "dialogues" with citizens. About 60 judges have personal Twitter accounts, which are used inter alia to present short summaries of judgments[167] or to highlight European activities of a judge.[168] The Judges'

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[162] Ibid.

[163] Reiling, *supra* note 62.

[164] 'Digitale procedures Rechtspraak blijven gewoon in gebruik' (press release, 15 April 2018, https://www.rechtspraak.nl).

[165] *See* F. Bakker, 'Nieuwjaarstoespraak 2018' (speech The Hague, 11 January 2018, https://www.rechtspraak.nl).

[166] *See* Press Guidelines 2013, https://www.rechtspraak.nl.

[167] Judge Joyce Lie, @JudgeJoyce.

[168] Judge Marc de Werd, @European Courts.

Code advises judges to choose an attitude of restraint in public expressions, including the use of social media.[169] Incidents have been few so far, but they underline that a mishap can occur and might lead to negative publicity for the judiciary. An example concerned a judge who commented critically on the awarding of a prize for "politician of the year" to parliamentarian Wilders. The District Court where this judge is active obliged her to close down her Twitter account because of concerns about judicial independence from politics which this tweet raised.[170]

In sum, the Dutch judiciary benefits from a sound basis of legitimacy and makes efforts at being responsive to changing societal demands. As one further point of attention, the diversity of the composition of the judiciary should be mentioned here. Studies conducted under the auspices of the Council for the Judiciary have tried to explain why ethnic minorities are not well represented within the judiciary. Yet, the courts have not been very successful so far in recruiting more judges from diverse backgrounds, despite the increased ethnic diversity among law graduates.[171] By contrast, the representation of women in the judiciary has been successful. In the courts of first instance, more than 50 percent of the judges are female. Indeed, the concern of gender balance has led some courts to strive for the recruitment of more male judges.[172] Still, the representation of women is still lagging behind with regard to management positions and positions at the highest courts.[173]

C. Repercussions of Judicial Self-Government for the Principle of Separation of Powers and the Democratic Principle: Constitutionalizing Autonomy

As a conclusion to this analysis of the effects of changes in judicial self-government in the Netherlands, we will consider which repercussions of these changes can be identified for the constitutional principles of separation of powers (I) and democracy (II). In particular, this analysis will address the extent to which the demarcation of autonomy of judges and JSG bodies has found a place in the constitutional framework for the judicial system.

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[169] Judges' Code, para. 2.5.4. *See* also S. DIJKSTRA, DE RECHTER ALS EVENWICHTSKUNSTENAAR (2016).

[170] 'Twitterende rechter krijgt reprimande voor "Knettergek"-tweet over Wilders' (*NRC Handelsblad*, 21 December 2016).

[171] L. Verheij, 'Etnische diversiteit in de Rechtspraak' (installation speech Court of Appeal of The Hague, 2 June 2016, https://www.rechtspraak.nl). *See* also S. VAN DER RAAD, OTHERING AND INCLUSION OF ETHNIC MINORITY PROFESSIONALS: A STUDY ON ETHNIC DIVERSITY DISCOURSES, PRACTICES AND NARRATIVES IN THE DUTCH LEGAL WORKPLACE (2015).

[172] L. van Wijk, 'Vrouwelijke rechters in de meerderheid: wat is daarvan het probleem?' (*Trouw*, 22 May 2014).

[173] https://www.rechtspraak.nl.

I. Separation of Powers

In general, we can identify several significant changes in the separation of powers in the Dutch system since World War II. Firstly, the transfer of competences by the Dutch state to the European Union and the recognition of the autonomous supranational EU legal order have affected the domestic separation of powers. In particular, the role of the national courts as "decentralized EU law courts" has provided judges with the competence to review national legislation, including Acts of Parliament, for its conformity with EU law.[174] Secondly, judicial review of the conformity of parliamentary acts with fundamental rights has been achieved through the judicial use of the ECHR as a reference norm. In this way, the traditional prohibition of judicial constitutional review[175] has become less significant. In combination with the first change, the relationship between the branches of government has shifted from the primacy of the legislator to a more balanced dialogue between the legislative and judicial branches.[176] Thirdly, a change has come about through the reform of the system of administrative justice, including the integration of administrative jurisdiction in the courts of first instance and the stricter separation of legislative advice and judicial tasks in the Council of State. In this way, a more independent system of judicial review of administrative action has been established.[177]

The reform of judicial self-government was significant for the separation of powers too. First of all, the new architecture of the judicial organization reflects contemporary views, in which the judiciary operates in a relationship of "checks and balances" rather than a strict separation of functions with the legislative and executive branches of government. Judicial self-government fits well with this shift in the balance of powers when compared to the traditional government by the executive branch.[178] Secondly, the reform of judicial self-government has prompted new reflections on the separation of powers, in particular by putting more emphasis on the guarantee of functional independence of judges involved in the management for the courts. In this regard, critical analyses have claimed that the Council for the Judiciary resembles a body of the executive power, notwithstanding the Parliament's explicit classification of the Council as a body of the judicial branch.[179] Advanced arguments focus on the Council's composition of members appointed by the

[174] M. CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2006).

[175] Art. 120 Constitution.

[176] J. GERARDS & J. FLEUREN (EDS.), IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF JUDGMENTS OF THE ECTHR IN NATIONAL CASE LAW (2014).

[177] *See supra*, A.II and B.II.

[178] Martens & Ten Kate, *supra* note 3, 1615.

[179] *Kamerstukken II*, 1999/2000, 27 182, no. 3, 3; *Kamerstukken II*, 2000/2001, 27 182, no. 6, 10.

Minister of Justice and Security for a limited term of office.[180] This classification is particularly problematic when criticism from judges is taken into account, holding that the Council has a tendency to coordinate its actions more with the Minister of Justice and Security than with the courts.[181] This potential blurring of the separation of institutions goes hand in hand with an increased "gray area" surrounding the separation of functions. In particular, the competence awarded to the Council for the Judiciary to issue guidelines to the courts empowers it to act as a quasi-legislature. In terms of managerial thinking, this shift in the distribution of functions could however also be considered to function as a useful "irritant" in the judicial organization, urging judges themselves to initiate activities aimed at the more effective and efficient administration of justice. An example is the initiative of the National Consultation Bodies (LOVs) to "take back control" over court procedures through the design of professional standards for judges.[182] Finally, the managerial turn has had positive effects on transparency of judges with regard to their extra-curricular activities, in this way ensuring that the separation of powers is guaranteed at the micro level of individual judges too.[183]

II. Democratic Principle

The reform of judicial self-government has not had major effects on the understanding of the democratic principle in the Dutch system. A potential concern remains that co-option is a strong mechanism in the selection and appointment of judges. The adequate functioning of this mechanism requires a high degree of professional integrity among judges in order to prevent nepotism. At the same time, this power of co-option is counterbalanced by the power of the executive power to formally decide on the appointment of judges. Yet, this structure remains inherently vulnerable, since it does not fully exclude political influences on the appointment of judges.[184] As it is, the strong rule-of-law culture among actors in the Dutch system safeguards that the democratic principle, underlying the competence of the executive power, and the principle of independence, underlying the judiciary's competence, keep each other in balance.

Besides this dance between public institutions, the increased societal call for responsive government has prompted initiatives to enhance participation of citizens in regulatory procedures as well as in court cases. In the judicial context, a democracy-enhancing

[180] P. Bovend'Eert, *Wat is er mis met de rechterlijke organisatie?* ARS AEQUI 406, 409 (2016).

[181] *See supra*, B.I.1.2.

[182] *See supra*, A.I.

[183] *See supra*, B.III.2.

[184] Compare the controversies surrounding two intended appointments in the Supreme Court in 2011; *see supra*, B.II. *See* also P.P.T. Bovend'Eert & C.A.J.M. Kortmann, *Het Court-Packing Plan van het cabinet-Kok* NEDERLANDS JURISTENBLAD 1769, 1771 (2000).

measure which deservers mentioning has been the introduction of the right of victims and relative of victims to speak in court during the trial in criminal cases.[185]

D. Conclusion

This article started out from the observation that judicial government in the Netherlands has changed drastically since the 1990s, prompted by a call for "organizational emancipation" of the judiciary in the balance of powers and implementation of insights from New Public Management theories to improve judicial performance. In the analysis of this development, it has become clear how rule-of-law values and NPM values interact in the contemporary legal framework for the Dutch judiciary. A predominant challenge in the shaping of a judicial organization based on these two sets of values concerns the demarcation of spheres of autonomy for the involved actors: judges, bodies for judicial self-government (most importantly the Management Boards at the courts and the Council for the Judiciary) and the Ministry of Justice and Security. The analysis in this article has mapped choices made in the architecture for the judicial organization as well as the experiences with this new model in practice.

As a conclusion to this analysis, judicial self-government in the Netherlands can be assessed as functioning adequately on the basis of a combination of rule-of-law values and NPM values. Judicial independence remains a core constitutional value. Factors that influence the de facto independence of the Dutch judiciary concern the integrity of individual judges and the systemic guarantees that enable judges to decide cases free from external pressure. The establishment of a stronger structure for self-government, in particular the concentration of competences with the Council for the Judiciary, has led to fierce debates within the judiciary concerning these systemic guarantees. On the one hand, a change in the organizational culture at the service of an effective and efficient judicial system (e.g. through more uniform procedures and through specialization of judges) seems unavoidable to meet contemporary societal demands within the constraints of a limited budget. On the other hand, organizational pressures should not prevent judges from exercising their individual capacity for judgment in each case that comes before them. It will remain a challenge for those involved in judicial government to do justice to both of these requirements.

The Dutch judicial organization, it can be concluded, is largely dependent on traditions of checks and balances between the judiciary and the executive branch which have developed over time. In this regard, a next change in judicial self-government could be on the horizon. Indeed, increased political pressure on judiciaries in other EU member states, such as Hungary and Poland, has inspired new reflections and has started to yield calls for stronger de iure safeguards for the Dutch judiciary against political control. In the words of

[185] Art. 51e, 258, and 260 Code of Criminal Procedure.

the former President of the Supreme Court, Geert Corstens: "Of course, there are all sorts of informal safeguards, but exactly these fall over easily when other winds start blowing."[186]

[186] Corstens, *supra* note 120.

Articles

The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition

Anna Śledzińska-Simon[*]

Abstract

This article argues that the establishment of the National Council of the Judiciary in 1989 and the empowerment of the general assemblies of court judges gave rise to the idea of judicial self-government in Poland. This very idea of self-government, implying that judges hold important decision-making or veto powers on matters concerning the judiciary, was regarded as a precondition of the separation of powers and judicial independence, neither of which existed under Communist rule. However, the package of laws introduced in 2017 marks the end of judicial self-government as we know it. Not only did it undermine the independence of the National Council of the Judiciary by altering the mode of electing its judicial members, but it also concentrated the power over the judiciary in the hands of the executive branch, allowing for, inter alia, the exchange of key positions in court administration and the reconfiguration of the Supreme Court. This article examines the impact of this "reform" on such values as independence, accountability, and transparency. Investigating the role of judicial self-government in ensuring the principle of separation of powers and democracy, the article concludes with an assessment of the early consequences of the introduced changes for the Polish judiciary.

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A. The rise of judicial self-government in Poland

I. Why historical context matters

The rise of judicial self-government in Poland is the effect of a transition from Communist regime to democracy. It was marked by the establishment of the National Council of the Judiciary (henceforth the NCJ or the Council) in 1989 and the empowerment of general assemblies of judges in courts. The article argues that the core achievement of the transition to democracy in Poland was the introduction of the idea of self-government in the judiciary, which implied that judges exercise certain decision-making powers directly or indirectly via their representatives. This particular understanding of judicial self-government has been recognized as a precondition of the separation of the judicial branch from the legislative and the executive branches, and fundamental to the guarantee of independence.

This article focuses on judicial reform concerning the system of ordinary courts, the Supreme Court, and the NCJ.[1] The reform was introduced in 2017, and it was proclaimed to enhance the democratic accountability of the judiciary and the effectiveness of the court system in Poland.[2] It will be argued that the reform actually deforms the present model of the judiciary in Poland and puts an end to the idea of judicial self-government as we know it. The reform concentrates the powers of the Minister of Justice (henceforth the MoJ) over ordinary courts and entrusts the election of judicial members in the NCJ to the legislature. By lowering the retirement age applicable to current judges of the Supreme Court, including the First President of the Supreme Court, the reform also violates the constitutional principle of irremovability of judges.

The immediate effect of the reform is the elimination of the existing system of checks and balances designed to secure the independence of the judiciary from the executive branch, and in particular to suppress the executive branch's tendency to influence adjudication. The article argues that the reform appears as a U-turn to the past and a breach of the "social contract", which laid the groundwork for the Constitution of 1997.[3]

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[1] The legislative package has been presented as a "reform" and this term will be further used to designate the recent changes in the judiciary.

[2] The amendments to the Act of 12 July 2017 on the System of Ordinary Courts, Official Journal 2017, Item 1452; the Act of 8 December 2017 on the Supreme Court, Official Journal 2018, Item 5; and the Act of 8 December 2017 on the National Council of the Judiciary, Official Journal 2018, Item 3.

[3] For some authors, the government of the Law and Justice party brings Poland back to dictatorship. ANDRZEJ ZOLL, MAREK BARTOSIK, OD DYKTATURY DO DEMOKRACJI. I Z POWROTEM (2018).

II. Judges under Communist rule

After the Second World War, Poland was among the satellite states aligned with the Soviet Union that accepted the Soviet-type constitution based on the principle of uniformity of powers.[4] Between 1949 and 1989 the Council of the State, as the nation's highest authority, held the power to appoint and remove judges,[5] while the interests of the Communist Party were guaranteed by two institutions: the Supreme Court and the MoJ. Court presidents and other managerial positions in the higher courts and in the Supreme Court were covered by the nomenclature system: the professional position depended on the opinion of the party milieu or the relevant department of the Central Committee of the Communist Party. Notably, there was a term of office (5 years) for judges of the Supreme Court and it was possible to exchange those persons who did not meet the expectations of the party leadership.[6] It was also a common practice to use the system of awards to motivate and discipline ordinary judges. In addition, relocation of a judge to another court was also a form of political influence over the judiciary.

The first postulations of the independence of the courts and judges were formulated by the "Solidarity" trade unions in 1980. Its leaders shared the political ambition to strengthen the role of judicial self-government and to empower the general assemblies of judges in courts. In this respect, the greatest success of the judicial trade unions was the negotiation of new rules for the appointment of court presidents in Warsaw in November 1981. It was agreed that the MoJ would hold the authority to appoint a president from two candidates selected by the general assembly of judges in an appropriate court.[7] Moreover, the MoJ also accepted that it would not request the removal of a judge by the Council of the State without consultation with the general assemblies of judges in an appropriate court. These concessions shaped the position of judicial self-government at the end of the Communist regime.

The Round Table negotiations held between 6 February and 5 April 1989 between the representatives of the Communist Party and the opposition led to democratic reforms that brought about a peaceful overthrow of the Communist system. They laid the groundwork for the introduction of the principle of irremovability of judges in the Constitution and the resignation of judges from the Supreme Court. Further, the requirement of "adequate performance of judicial duties", which served as a proxy for political loyalty in the Communist period, was erased. It was also settled that court presidents would hold their

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[4] Constitution of the People's Republic of Poland of 22 July 1952, Official Journal 1952, No 33, Item 232.

[5] Article 60(1) of the 1952 Constitution.

[6] *Stara szkoła sędziowska*, RZECZPOSPOLITA (October 6, 2012), http://www.rp.pl/artykul/939507-Stara-szkola-sedziowska.html

[7] STRZEMBOSZ, *supra* note 10, 126. After 1989 such a rule was adopted for all courts.

office for a specified term in order to eliminate their alienation from other judges. While their appointment was still in the hands of the MoJ, the choice was limited to two candidates selected by the general assemblies of judges in a respective court.

Nevertheless, the most remarkable concession of the Communist Party in the Round Table agreements was the introduction of the National Council of the Judiciary. It thus appears as a bottom-up initiative put forward by legal experts and judges related to the "Solidarity" trade unions in the early stage of the democratic transition, rather than a solution mandated by international organizations or the accession to the EU.

III. Settling accounts with Poland's Communist past and the question of legitimacy

The country's democratic transition left the question of how to settle accounts with its Communist past and establish a transparent judiciary. Notably, Poland did not establish any extraordinary procedures to cleanse the judiciary from "unworthy" judges after the regime change. Instead the judiciary had to clear itself from within. At first, the most compromised judges left the judiciary on their own, often moving to other legal professions. Others were *de facto* removed by the NCJ, which did not allow them to continue their service after reaching the retirement age.[8] Finally, the Parliament entrusted the verification process to disciplinary courts in 1997.[9] However, a procedure for an official removal from the judicial profession by disciplinary courts for offences committed between 1944 and 1989 did not actually work.

Overall, there were only 30 disciplinary proceedings initiated against 55 judges, out of which only 4 were heard by disciplinary courts, and all were acquitted. The law has clearly had a hidden internal flaw – it allowed the initiation of disciplinary proceedings against a judge only in relation to a concrete case, rather than evaluating her entire judicial activity in a particular court over a period of time.[10] Therefore, judges who were involved in political trials may have remained in office after the regime change.

Still, some judges and prosecutors who served or were employed in so-called "formations of repression" against the Polish Nation or against persons acting for Polish independence were deprived of their special pension benefits. This sanction could be ordered by the NCJ after a judge had been sentenced by a court for crimes committed in service, removed from service by a disciplinary court, or after a court found that her declaration concerning

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[8] Between 1990 and 2000 the Council refused to permit 511 judges to continue service for reasons related to their past. Ewa Siedlecka, Jak to sędziowie się samooczyszczali, GAZETA WYBORCZA (September 26, 2016), http://wyborcza.pl/1,75968,20746326,jak-to-sedziowie-sie-samooczyszczali.html

[9] Judgment of 24 June 1998, Case no. K 3/98.

[10] STRZEMBOSZ, *supra* note 10, 159.

collaboration with the Communist regime was untrue.[11] Also in this regard the effects of the law were rather modest.[12]

Another measure aimed to enhance the social legitimacy of the judiciary was the lustration law, which mandated that certain public officials, including judges, make public declarations about their collaboration with the state security service.[13] However, only those judges who lied about their past could be prosecuted for a "lustration lie" and subjected to a criminal sentence, including the deprivation of all public rights, their status as a retired judge, and their special pension benefits. Moreover, the Constitutional Tribunal confirmed that judges are guaranteed immunity in the lustration proceedings, which needs to be waived by a disciplinary court on request of the National Institute of Remembrance. According to the Constitutional Tribunal, judicial immunity helps to protect judges against hasty or instrumental use of lustration proceedings that may place their independence in question.[14]

Today only a small percentage of judges in service began their careers before 1989. Still, the government openly claims that the Polish judiciary is dominated by post-Communist judges.[15] Clearly, these statements form a part of its populist rhetoric, but there is a grain of truth in the argument suggesting that the decommunization process in the judiciary has not been completed due to the unwillingness of judges to harm their peers. Nevertheless, the Supreme Court, once a symbol of judicial dependence on the Communist party, was subject to an informal decommunization process, because all the Supreme Court judges had to be reappointed by the National Council of the Judiciary in 1990. As a result, only 22 judges who served in the old court remained in office after receiving positive verification in the reappointment process, while 80 percent of the old judges did not pass this threshold.

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[11] The European Court of Human Rights confirmed that the loss of status of a retired judge and of the special pension benefits attached to that status, as a result of the submission of a false lustration declaration, do not amount to an interference with one's property rights protected under Article 1 of Protocol No. 1. *See Rasmussen v. Poland*, judgment of 28 April 2009, App. No. 38886/05.

[12] According to Ewa Siedlecka, only 66 judges were deprived of their special pension benefits. Ewa Siedlecka, *Bez końca, do grobowej deski, czyli zemsta na PRL. Ewa Siedlecka o 30 latach rozliczeń z komunizmem*, OKOPRESS, https://oko.press/bez-konca-grobowej-deski-czyli-zemsta-prl-ewa-siedlecka-o-30-latach-rozliczen-komunizmem /

[13] Official Journal 2006, No 219, Item 1592.

[14] Judgment of 2 April 2015, Case No. P 31/12.

[15] M. Morawiecki, *Why My Government is Reforming Poland's Judiciary*, WASHINGTON EXAMINER (Dec. 13, 2017), https://www.washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary

IV. Who governs the judges in Poland?

Judicial governance in Poland is shared by the executive branch, the National Council of the Judiciary, court administration (represented by court presidents), and the bodies of judicial self-government. According to the Constitution, the administration of justice is exercised by the Supreme Court, as well as by ordinary, military, and administrative courts.[16] The Constitution also provides for a two-tiered court procedure, leaving the organization of the court structure, jurisdiction, and proceedings to ordinary legislation. In practice, judicial appointments, promotion, training, disciplinary proceedings, and immunity hinge on the mutual relations between the main actors in the judiciary. Additionally, there is a growing position of private associations of judges who represent the voice of the judiciary vis-à-vis the state organs, although they do not have any formal competences.

The power to appoint judges is a presidential prerogative.[17] It may be used only on a motion of the NCJ, but the prerogative permits the President to refuse to appoint a particular candidate without reason. The selection of candidates for judges and for judicial promotion depends on a positive assessment by the bodies of the judicial self-government in the respective courts. Candidates for judges and candidates for judicial promotion must meet a number of statutory criteria to be appointed to a particular court,[18] and they must additionally be approved by the respective court college and general assembly of judges.

The President of the Republic appoints apprentice judges or prosecutors (*aplikanci sędziowscy* and *aplikanci prokuratorscy*) to the position of probationary judges (*asesorzy sądowi*).[19] This power also relies on a motion by the NCJ.[20] Probationary judges are graduates of the National School for Judges and Prosecutors who have passed judicial

[16] The system of ordinary courts is comprised of district, regional, and appellate courts. There are 377 ordinary courts, out of which there are 321 district courts, 45 regional courts, and 11 appellate courts. There are also 16 regional administrative courts and the Supreme Administrative Court but the status of administrative court judges is not specifically analysed in this study.

[17] Article 144(3)(17) of the Constitution.

[18] A judge of a district court must meet the following criteria: 1) hold only Polish citizenship, enjoy full civic and public rights; and not be sentenced by a court for a publicly indictable crime; 2) have a good character; 3) have graduated from a school of law in the Republic of Poland and hold a Master's degree or foreign legal studies recognized in Poland; 4) be eligible with regard to the state of health to perform the duties of a judge; 5) be at least 29 years old; 6) have passed the exam for a judge or a prosecutor; 7) have performed the duties of a judge for a period of at least three years as a probationary judge. Article 61(1) ASOC.

[19] Official Journal 2018, Item 1045.

[20] Article 33a (14) of the Act of 23 January 2009 on the National School for Judges and Prosecutors, Official Journal 2009, No. 23, Item 157.

examination.[21] Although the status of probationary judges has sparked a lot of controversy in the past, it is now similar to that of a judge, including the guarantee of irremovablity.[22] The important difference is that probationary judges serve exclusively at district courts and may not decide on the use of pre-trial detention in preparatory proceedings against a detained person; on complaints against decisions refusing to initiate an investigation, or discontinuing an investigation; and on cases in the field of family and guardianship law.[23] Since the reform of the National School for Judges and Prosecutors in 2017,[24] the appointment of probationary judges has become the preferred track to a judicial career. They can become full-fledged judges after a minimum of 4 years of service if positively appraised by the MoJ.[25] The other way is to pass judicial examination as an external candidate.[26]

The MoJ exercises supervision over the administration of justice.[27] There is a thin line between the administrative supervision of the MoJ over the administration of justice and the exercise of justice.[28] Due to the tendency of all previous Ministers of Justice to expand their supervision threshold, it has been a recurring postulate to entrust this competence to the First President of the Supreme Court.[29] In the opinion of the Constitutional Tribunal,

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[21] Article 106h ASOC.

[22] Article 106k ASOC. In 2007, the Constitutional Tribunal found that the law granting probationary judges adjudicatory functions contravenes the principle of judicial independence because they could be removed by the MoJ. Judgment of 24.10.2007, Case no. SK 7/06.

[23] Article 2(1)(1a) ASOC.

[24] The National School for Judges and Prosecutors was established in 2009 to counteract local parochialisms of the judicial training organized by the appellate courts. It was designed to follow the best traditions of professional schools in Europe. However, the School remains institutionally related to the Ministry of Justice and this relationship was tightened in 2017. The MoJ appoints the Director of the School and the members of the Program Council. The MoJ may also object to the employment of individual lecturers.

[25] Article 106i(8) ASOC.

[26] Such as court referendaries and assistants, other legal professions trying to transfer to the profession of a judge (attorneys at law, legal advisers, notaries or prosecutors) and persons who completed the judicial training under the old system attached to the appellate courts.

[27] Article 9 ASOC.

[28] Judgment of 15 January 2009, Case no. K 45/07. In this decision the Tribunal explained that the Minister's power to issue reproaches against individual judges is constitutional as long as it does not interfere with the adjudicative function. The Tribunal also found that the Minister's power to appoint temporary court presidents is unconstitutional since the law did not provide any time limitations for serving in this capacity. The Tribunal upheld the practice to delegate judges to the Ministry of Justice provided that the delegated judges abstain from adjudication. However, the Tribunal struck down the law providing for the delegation of judges against their consent.

[29] The power of administrative supervision over administrative courts belongs to the President of the Supreme Administrative Court.

the ministerial supervision over the administration of courts is not unconstitutional *per se*, but it should not involve measures concerning judicial decisions in individual cases such as planning court proceedings or setting dates for a hearing.[30] These actions, however, may be subject to the internal administrative supervision exercised by court presidents or heads of court divisions.[31]

The MoJ has the power to establish and abolish courts and court divisions; to appoint and dismiss court presidents; to initiate disciplinary proceedings against a judge; to issue reproaches against a judge; to appoint directors general in each court; to revoke administrative orders; and to issue internal regulations binding in courts. The MoJ carries out these supervisory tasks through inspection visits, statistical analysis, examination of case files, and hearing complaints against judicial decisions. In its current practice, the MoJ exercises external supervision over the administrative activities of the courts by a supervisory service composed of judges delegated to the Ministry of Justice and directors general.

Court presidents are the key officials in the court administration. Moreover, one can hardly separate their administrative functions from their functions related to the exercise of justice.[32] They represent the court and manage the caseload. They assign judges to respective divisions in courts and set out their duties. They dispose of several discretionary competences through which they can exercise pressure over individual judges. They may request that a decision is rendered by a particular time. They may also refuse to extend the deadline for a written justification of a decision, while a delay may trigger a disciplinary action against a judge. They may issue a critical notice on irregularities in the work of a judge, to be included in her personal files. They may also request the initiation of disciplinary proceedings on grounds unrelated to a judge's caseload. Court presidents are also official superiors of judges, probationary judges, court referendaries, and assistants, as well as other employees of the court, except directors general. They make decisions about important personnel matters such as on-call and substitution rosters. They also need to approve the teaching positions of judges in academia and judges' relocation to another court.

According to a narrow, statutory definition, judicial self-government is constituted by the general assemblies, which are composed of judges of various courts.[33] It includes the

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[30] *See* also judgment of 1 October 2015, Case Kp 1/15 (concerning the ministerial power to request access to pending case files)

[31] Case no. K 45/07.

[32] Case no. K 45/07.

[33] Article 3 of 27 July 2001 of the Act on the System of Ordinary Courts (further as ASOC), Official Journal of 2001, No 98, Item 170.

general assemblies of judges in appellate courts,[34] the general assemblies of judges in regional courts,[35] and the general meetings of judges in district courts.[36] Additionally, there are also colleges of judges in appellate and regional courts. The bodies of judicial self-government have traditionally exercised some consultative powers in the decision-making processes concerning the judiciary.[37] One of the most important competences of the general assemblies of judges is to express opinions about candidates for judges and court presidents.[38] It should also be noted that the bodies of judicial self-government lack a centralized structure that would otherwise help to consolidate their positions and communicate with the political branches of government or with society. Until recently, this integrative role has been *de facto* played by the NCJ.

V. The National Council of the Judiciary

The first Act of the National Council of the Judiciary was adopted on 20 December 1989 pursuant to the amended Constitution of 1952. However, it was not thoroughly consulted with judges and failed to avoid the challenge of exclusively serving the interest of the judiciary rather than the interest of justice. For that reason, the first Council had rather limited powers. The powers included consideration of candidatures for judges of the Supreme Court, the Supreme Administrative Court, military, and ordinary courts; hearing cases on reassignment of judges to other posts; establishing the number of members of disciplinary courts; granting consent to remain in office to judges who reached 65 years of age; and expressing views about the rules of ethical conduct for judges.

The Constitution of 1997 envisioned the NCJ as an independent organ of state administration that is functionally related to the administration of justice,[39] although in the

[34] It is comprised of the appeal court judges, the representatives of regional court judges acting on the area of the appellation, in the number corresponding to the number of the appeal court judges, and the representatives of district court judges acting in the area of the appellation, in the same number determined by the college of the appellate court.

[35] It is comprised of the regional court judges and the representatives of district court judges acting in the area of the region, in the number corresponding to the number of the regional court judges.

[36] It is comprised of all judges of a district court.

[37] The general assembly of judges in the appellation also expresses opinions about the annual information on the court activities prepared by the director general of the appellate court and the annual report delivered by the president of the appellate court.

[38] Among all bodies of judicial self-government, the position of the general assembly of judges in the appellation is the strongest, while the general assemblies of judges in court regions, and the general meetings of judges of district courts have more limited competences. The general assembly of judges in the appellation expresses opinions about candidates for judges of the appellate courts and candidates for judges of the regional courts in a given appellation, and about candidates for the president of the appellate court.

[39] Katarzyna Zawiślak, *Pozycja ustrojowa, kompetencje i skład Krajowej Rady Sądownictwa*, 3(9) IUSTITIA 117 (2012).

literature it also appears as a "non-judicial organ of the administration of justice".[40] Its independence is demonstrated by the power to elect the President and two Vice-Presidents of the Council and the power to adopt internal rules and decisions by the majority of members sitting in a plenary session.[41] The NCJ was established as the guardian of the separation of powers and the independence of courts and judges, and indirectly for the effective realization of the right to a fair trial enshrined in Article 45(1) of the Constitution.[42]

The main competences of the NCJ include: 1) selection of candidates for judges of the Supreme Court and the Supreme Administrative Court, as well as judges of ordinary, administrative, and military courts and their presentment to the President of the Republic for judicial appointment; 2) issuing individual decisions on the reassignment of judges to other posts (and their return to previous posts) or their retirement; 3) presenting opinions on the appointment and the dismissal of presidents and vice-presidents of ordinary and military courts; 4) adopting rules of ethical conduct for judges and supervision of their compliance; 5) expressing views on the judicial cadre; 6) presenting opinions regarding legislative acts concerning courts and judges, including the section of the state budget relevant to the judiciary and other legal acts regarding the salary of judges;[43] 7) presenting opinions on the judicial apprenticeship training programs, as well as the entry exams for the judicial apprenticeship and the final exams for judges; 8) expressing views on current problems concerning the judiciary to the President of the Republic or to other public organs or bodies of judicial self-government.

The Council also had the power to appoint the main disciplinary spokesman of ordinary courts and the disciplinary spokesman of military courts and to request for such a person to initiate disciplinary proceedings. Currently, this power has been moved to the MoJ. The Council may appeal against decisions of disciplinary courts of lower rank and request the reopening of disciplinary proceedings. Additionally, there are certain institutional links between the National Council of the Judiciary and the National School for Judges and Prosecutors. The Council's opinion is required for the appointment and the dismissal of the

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[40] Tadeusz Ereciński, *Rola rady sądownictwa w państwie demokratycznym*, 5 PREZEGLAD SEJMOWY 3 (1994), 15.

[41] Since 2006 the Council has also had an independent budget. Article 231 of the Act of 30 June 2005 on the public finances, Official Journal 2005, No. 249, item 2104.

[42] Krzysztof Szczucki, *Komentarz do artykułu 186 Konstytucji RP*, *in* KOMENTARZ DO KONSTYTUCJI RP (Marek Safjan & Łukasz Bosek eds.) (2016), para. 10.

[43] According to the established case-law of the Constitutional Tribunal, legislative proceedings disrespecting the obligation to consult the Council on acts concerning the independence of courts and judges or leaving the Council without time to react to legislative drafts or amendments to such drafts amount to a procedural breach of the Constitution and may result in a declaration that the acts adopted via such proceedings are unconstitutional. *See* i.e. judgments of 24 June 1998, Case no. K 3/98, and of 19 November 1996, Case no. K 7/95.

director of the National School and the Council appoints one member of the Program Board.

The Council may also initiate proceedings before the Constitutional Tribunal and request an abstract constitutional review on matters concerning the independence of courts and judges.[44] Although the mandate of the NCJ is limited to matters regarding the independence of courts and judges, it has occasionally proved to be very effective in preventing legislative and executive interferences in judicial power. It is also accepted that the Council may challenge normative acts affecting its own position. This power is necessary to realize the constitutional role of the Council.[45] Moreover, the Council may also challenge normative acts concerning the position of the Constitutional Tribunal insofar as these acts are related to the realization of the principle of independence of the Tribunal and the Tribunal's judges.[46]

The Council has a hybrid composition that includes representatives of the legislative, executive, and judicial branches, as established by the Constitution. According to Article 187(1) of the Constitution, the members of the NCJ include the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.

In sum, there are 25 members of the Council and most of them are appointed for a fixed term of office (4 years). The term of office for the First President of the Supreme Court, the President of the Supreme Administrative Court, the MoJ, as well as the representatives of the Sejm and the Senate is tied to their primary office. In addition, the President of the Republic can dismiss the individual he appointed to the Council at any time.[47]

Although the NCJ is not regarded as the organ of judicial self-government, the Constitution gives judges a numerical dominance over other branches of government on the Council. The representatives of the judiciary have furthermore dominated the work of the Council in practice, since the presence of other non-judiciary members of the Council in the plenary sittings has been less regular. This practice crystalized after the Constitutional Tribunal confirmed that a Council member needs to be present in person in order to

[44] Article 186 (2) of the Constitution.

[45] Case no. K 40/08.

[46] Judgment of 9 December 2015, Case no. K 35/15.

[47] Article 8(1) of the Act on the NCJ of 2011 as amended.

vote.[48] This decision practically excluded the participation of the MoJ, and it limited the participation of the First President of the Supreme Court and the President of the Supreme Administrative Court from lengthy deliberations concerning individual matters such as the evaluation and selection of candidates for judicial appointments.[49]

Clearly, the most contentious issue is the representation of the judicial branch on the Council. The Constitution is silent on this matter and does not stipulate that all judges shall have equal voting rights in the election of the judicial members of the Council. Still, it would be possible to introduce a proportionate system of voting by statute.[50] Until 2017, the 15 judicial members in the Council were allocated as follows: 2 members were judges of the Supreme Court; 2 members – the judges of administrative courts; 2 members – the judges of appellate courts; 8 members – the judges of regional and district courts; and, 1 member – a judge of a military court.[51] As a result, judges of higher courts were overrepresented, while the district court judges did not have an adequate number of representatives (for example, in the last term of the NCJ there was only one judge from the district court).[52]

The Law and Justice party vigorously used this apparent problem with the lack of democratic representation of judges in the Council to justify the decomposition of the Council and to change the mode of election of all judicial members. In the first move, the MoJ (acting in the capacity of the Prosecutor General) challenged the previous Act on the NCJ before the Constitutional Tribunal with regard to the mandate of the elected judges.[53] The Constitutional Tribunal - a 5-judge panel composed of persons appointed by the current government (whose status could be questioned due to the unconstitutional

[48] Case no. K 40/08, para 44.

[49] In another decision the Constitutional Tribunal found that the law may not prohibit the judicial members of the Council from holding the office of president or vice-president of a court. Judgment of 18 July 2007, Case no. 25/07.

[50] Piotr Mikuli, *Konstytucyjność wyboru sędziów sądów powszechnych do KRS*, 4(9) KRAJOWA RADA SADOWNICTWA 9 (2014).

[51] The Act on the NCJ of 2011 introduced a complicated electoral system for judges of ordinary courts based on indirect voting, which evidently underprivileged judges of district courts.

[52] As the lack of democratic representation of judges in the Council attracted much criticism, the Association of Polish Judges "Iustitia" agreed to grant judges of the lower courts more equal representation in the Council. It proposed to introduce a new electoral system based on the principle of direct voting and reserved seats. See the draft amending the Act on the NCJ presented by "Iustitia" as an alternative to the Act adopted by the Parliament in July 2017.

[53] The Prosecutor General argued that several provisions on the Act on the NCJ violate the principle of equal (passive and active) voting rights of judges of different courts in a way that restricts their ability to stand in elections for members of the National Council of the Judiciary. It also challenged the Act with respect to the concept of the individual mandate of elected members of the Council.

circumstances of their nomination) - held that Article 187(3) of the Constitution implies a collective mandate of all elected members of the Council.[54] In effect, the Tribunal confirmed that the present individual mandate of judges is invalid. This decision gave the government a "legitimate" reason to reform the election process and move the authority to select judicial members away from the bodies representing the judiciary and into the hands of the Parliament.

B. The fall of judicial self-government in Poland

The following section will argue that the recent judicial reform introduced in 2017 marks the end of judicial self-government in its current form. The reform was accompanied by a media campaign presenting judges as an insulated caste and accusing them of nepotism, corruption, laziness, and abuses of justice under Communist rule.[55] However, those who still remember the Communist period led massive street protests in support of the Supreme Court and the independence of courts and judges.[56] The reform was criticized by the National Council of the Judiciary,[57] the Association of Polish Judges "Iustitia", the Ombudsman,[58] international and national legal experts,[59] as well as the Venice Commission[60] and the UN Special Rapporteur on the Independence of Judges and Lawyers of the Human Rights Council.[61] It also triggered a reaction from the European Commission,

[54] Judgment of 21 June 2017, Case no. 5/17.

[55] The campaign "Fair courts" was commissioned by the government and was led by the Polish National Foundation endowed with millions of Polish zloty for outdoor and TV campaigns, Internet presence, as well as viral activities.

[56] Rick Lyman, *In Poland, An Assault on Courts Provokes Outrage*, NEW YORK TIMES (July 19, 2017), https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html

[57] Opinion on the MPs' draft of the law amending the Act on the System of Ordinary Courts and other acts (Print no. 1491), (May 12, 2017).

[58] "Plowing up the courts" (July 19, 2017), https://www.rpo.gov.pl/en/content/%E2%80%9Cplowing-courts-adam-bodnar-onetpl-changes-judicial-system

[59] Grainne de Búrca and Wojciech Sadurski, *Open Letter to Vice-President Frans Timmermans,* VERFASSUNGSBLOG *(June* 9, 2018), https://verfassungsblog.de/open-letter-to-vice-president-frans-timmermans/

[60] Opinion No. 904/2017 (Dec. 11, 2017), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e (noting that the reform bears "a striking resemblance with the institutions which existed in the Soviet Union and its satellites").

[61] Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add1, (April 15, 2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18 /084/27/PDF/G1808427.pdf?OpenElement

which for the first time decided to use the procedure stipulated in Article 7 of the EU Treaty against a Member State defying the rule of law.[62]

One of the officially proclaimed goals of the reform that is the decommunization of the judiciary begs the question of whether it is legitimate almost 30 years after the regime change. Further, the means employed to serve this aim are proportionate since they concern all judges regardless of the individual person's actual role in the Communist system. In any case, settling accounts with the past by lowering the retirement age of all current judges of the Supreme Court is overbroad and thus disproportionate. It also violates the constitutional guarantee of irremovability and disregards the fact that an expiration of the President of the Supreme Court's term of office is contrary to Article 183(3) of the Constitution, which sets the term of office for six years.

Taking alone the reconstruction of the Supreme Court and the National Council of the Judiciary, it is evident that the hidden goal of the government was to replace the key actors in the administration of justice with persons accepted or nominated by the Minister of Justice. Additionally, the new rules of ministerial supervision over the administration of justice and the new system of disciplinary courts have turned political loyalty into an eligibility criterion upon which a judge's career may depend.[63]

I. Diminishing the role of judicial self-government in the appointment and dismissal of court presidents

Since 2017 the MoJ has had the authority to appoint all court presidents. It then "presents" the appointees to the general assembly of judges in the appropriate court.[64] Before the reform, the general assembly had to express its opinion on the candidates. A negative opinion by the general assembly, if sustained by the NCJ, was binding on the MoJ.[65] In the same fashion, the power of dismissal previously required the approval of the general assembly of judges in the appropriate court, and if there was no such approval then the approval of the NCJ was required. Only the presidents of district courts were appointed and removed by the presidents of appellate courts, who were accountable to the MoJ for the effectiveness of all courts in their jurisdiction. The MoJ could remove the presidents of

[62] Reasoned Proposal under Article 7(1) for a Council Decision regarding rule of law in Poland (Dec. 20, 2017), 21, http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108

[63] Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, SYDNEY LAW SCHOOL RESEARCH PAPER No. 18/01 (Jan. 17, 2018), https://ssrn.com/abstract=3103491

[64] Articles 23, 24, and 25 ASOC.

[65] This mechanism was introduced during the first government of the Law and Justice party (2005-2007). It replaced a provision which gave the MoJ the power to appoint the president of a court from two candidates presented by the general assembly of judges.

appellate and regional courts during their term of office, for instance, for a gross failure to perform their professional duties, with the consent of the NCJ. Pre-reform, the opinion of the NCJ served as a safeguard against "hasty" decisions depriving certain persons of their official function. However, as the government of the Law and Justice party argued, it limited the ability of the MoJ to influence effective caseload management among the courts.

Under the 2017 amendments, the dismissal of a court president may only be objected to by the NCJ in a decision taken by a two-thirds majority vote, which is hard to obtain.[66] Furthermore, the 2017 amendment strengthened the hierarchical subordination of the presidents of lower courts to the presidents of the appellate courts, and ultimately to the MoJ. The presidents of upper courts can reprimand presidents of lower courts. However, the ultimate decision lies with the MoJ, which can uphold or reject a critical notice or issue such a notice unilaterally.[67] If a critical notice is upheld, the MoJ may also decide to reduce the salary or functional allowance of the respective president of the court. In this pyramid, the MoJ becomes the highest disciplinary authority in a "chain of command".[68]

In effect, the recent judicial reform has deprived the general assemblies of judges of their veto powers in the process of the appointment and dismissal of court presidents. It has thereby weakened the general assemblies' position. Additionally, the general assemblies of judges in regional courts lost the exclusive power to appoint members of the college of judges.[69] The reform also modified the eligibility criteria for the positions of court president, allowing lower court judges to hold this office in higher courts. Last but not least, the amended Act on the Supreme Court provides that the President of the Republic appoints the First President of the Supreme Court from among 5 candidates. In application, this means that a candidate who got the least votes of the General Assembly of the Supreme Court could nevertheless be appointed.[70] In sum, it is a shared view that the modification of the appointment and dismissal procedure of court presidents, the introduction of new supervision tools, and the gradual disempowerment of judicial self-

[66] On 12 April 2018 the Parliament adopted an amendment to the acts implementing the judicial reform. This amendment is presented as a concession to the recommendations made by the European Commission. It provides that the dismissal of a court president requires an opinion of the college of a respective court. If the college disagrees with the dismissal, the MoJ needs to seek the approval of the NCJ. Official Journal 2018, Item 848.

[67] Article 37e ASOC.

[68] Venice Commission, Opinion 904/2017, *supra* note 60, para 109.

[69] The college of a regional court now consists of the court president, the oldest vice-president, the representatives of district courts, elected by the meetings of district court judges from among the district court judges, one from each district court, and two representatives of regional court judges, elected by the meeting of regional court judges. *See* amendment to the ASOC of 12 April 2018, Official Journal 2018, Item 848.

[70] Article 12 of the Act on the Supreme Court, Official Journal 2018, Item 5.

government is likely to affect Poland's realization of the principle of judicial independence.[71]

II. The political capture of the NCJ

The second step leading to the fall of judicial self-government in Poland was made with the adoption of an amendment to the Act on the NCJ extinguishing the constitutionally prescribed term of office of the judicial members and altering the mode of their election. Since the reform came into force, the parliamentary majority has held the power to appoint the judicial representatives on the Council. The politically-driven Council will now fill numerous judicial vacancies in courts. The reform lowered the retirement age for its current judges, as well as for judges of ordinary courts, and it created two new Chambers of the Supreme Court, which will also be filled by the Council.

The political capture of the NCJ played out in two parts. First, the Parliament passed the amendment to the Act on the NCJ on 12 July, 2017, but the President blocked it by veto. Then he proposed his own draft, which nevertheless raised the same concerns as the rejected amendment. The Presidential draft was passed into law on 8 December, 2017, after a round of negotiations with Poland's political leadership.

Pursuant to the new law, the Sejm elects 15 judicial members by a three-fifths majority.[72] If the qualified majority does not accept the full list of candidates, then the list may be later passed by an absolute majority. Crucially, the voice of the judiciary in this process can only be heard during the pre-selection of candidates since judges have the right only to appoint "candidates for candidates" for the judicial members in the Council. Precisely, candidates can be proposed by either 25 judges (excluding retired judges) or by 2000 citizens who are eligible to vote. There is then to be a nomination by the parliamentary party caucuses, which may select up to 9 candidates. After this stage, a parliamentary committee chooses 15 persons from among the pre-selected candidates to be elected by the Sejm for a collective mandate. In this way, the political branch has taken control over the election of judges on the Council[73] and the Council has lost its independent mandate.

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[71] *The response of the Polish Judges Association „Iustitia" to the White Paper on the Reform of the Polish Judiciary presented to the European Commission by the Government of the Republic of Poland* (March 24, 2018), 37, https://www.iustitia.pl/images/pliki/response_to_the_white_paper_full.pdf

[72] Act of 8 December 2017 amending the Act on the National Council of the Judiciary, Official Journal 2018, Item 5.

[73] According to the Special Rapporteur on the Independence of Judges and Lawyers in Poland "(t)he fact that judges will no longer have a decisive role in the appointment of the 15 judicial members of the Council puts the new election method at odds with relevant international and regional standards". Report, *supra* note 61, point 68.

Notably, the change took effect during the term of office of the current members. It also contravened the existing standard for legislative intervention in the composition of the NCJ, which should only be applicable to the next term of office.[74] For these reasons, both the judges' associations and the opposition parties boycotted the election of the new judicial members as unconstitutional. As a result of the boycott, there were only 18 candidates for 15 vacant positions.

C. The Impact of the Judicial Reform on Independence, Accountability, and Transparency in the Judiciary

I. Independence

The Constitution of 1997 guarantees both the independence of the courts and the independence of judges. The independence of the courts is enshrined in the principle of separation of powers (Article 10) and specified in Article 173, which provides that courts and tribunals shall constitute a separate branch of the government and shall be independent of other branches of power. The institutional insulation of the judiciary is further guaranteed by the position of the Supreme Court, which exercises supervision over the adjudication of ordinary and military courts.[75]

The Constitution stipulates that judges shall be independent in the exercise of their office and subject only to the Constitution and statutes. It guarantees appropriate working conditions and remuneration corresponding to the dignity of the office and the scope of the judicial duties in addition to life tenure and immunity. More specifically, the Constitution provides that to recall a judge from office, to suspend her from office, or to transfer her to another bench or position against her will requires a court order, which is limited to instances prescribed by statute. Additionally, Article 178(3) of the Constitution prohibits judges from becoming members of political parties or trade unions and from performing public duties that are incompatible with the principle of judicial independence.

According to the constitutional standard developed by the Constitutional Tribunal, the process of appointing court presidents requires the involvement of the general assemblies of judges[76] and the NCJ.[77] Their participation in this process should fetter the discretion of the MoJ over positions in court administration, which are closely connected to the exercise of justice.[78] On this ground, the Constitutional Tribunal held that the minimum protection

[74] Judgment of 18 July 2007, K 25/07.

[75] Article 183 of the Constitution.

[76] Judgment of 9 November 1993, Case no. K 11/93.

[77] Judgment of 18 February 2004, Case no. K 12/03.

[78] Case no. K 11/93.

of judicial independence is provided by the statutory obligation to obtain an opinion on a candidate for the position of court president from the appropriate body of judicial self-government (the general assembly of appellate judges – for the appointment of the president of the appellate court, and the assemblies of regional judges – for the appointment of the president of the regional court).[79] In the case of a negative opinion, a candidate needs to secure a positive opinion from the NCJ.[80] Following this view, the recent judicial reform runs counter to the constitutional interpretation of the principle of the separation of powers and judicial independence.

The most problematic change, however, was introduced in 2017 and was the product of a temporary power bestowed upon the MoJ. The MoJ was granted authority to dismiss any court president within a period of six months following the enactment of the amendment to the Act on the System of Ordinary Courts. This transformation was then followed by the newly appointed presidents' grant of power to dismiss the entire court management, including heads of court divisions or court sections, and court inspectors.[81] These powers made it possible to verify which judges held the highest executive functions and exchange them for persons who offered a guarantee of loyal service to the political leadership. As was already mentioned, the MoJ has also gained the power to award or discipline the court presidents financially. The MoJ may now reprimand court presidents and vice-presidents for administrative misconduct and reduce their functional allowance for a period of one to six months.[82] Moreover, the MoJ may also increase or reduce appellate court presidents' functional allowance based on the results of their annual evaluations.[83]

The recent reform also provided that judges delegated to the Ministry of Justice are entitled to conduct the "lustration", or purification, of a court or a court division by carrying out supervisory activities over court presidents. It has been noted that lustration entails the supervision of adjudicatory activities, a role that should be reserved for court presidents.[84] One should note in this context that the position of delegated judges (to the Ministry of Justice or to other courts) in the structure of the Polish judiciary is highly

[79] Before the reform, the MoJ could appoint court presidents only in appellate and regional courts (less than 15% of all courts in Poland). In this respect, the government argued that the Minister did not have effective tools to react to bad management in district courts.

[80] Case no. K 12/03.

[81] During the period of six months after the amendments came into force, the Minister removed 130 out of 730 court presidents, often against the will of the general assemblies of judges in these courts.

[82] Article 37ga ASOC.

[83] Article 37h ASOC.

[84] Opinion, *supra* note 57, http://www.krs.pl/pl/aktualnosci/d,2017,5/4782,opinia-krajowej-rady-sadownictwa-dotyczaca-poselskiego-projektu-zmiany-ustawy-prawo-o-ustroju-sadow-powszechnych

problematic.[85] The MoJ has the power to withdraw such delegation (and detach a judge from adjudication of a specific case), and as a result these judges are dependent on the executive.

The impact of the recent reform on *de facto* independence should be assessed while taking into account another institutional change regarding the position of the MoJ: namely, the merger of the MoJ with the office of the Prosecutor General.[86] In addition to the new possibilities to use supervisory tools to exert political pressure over court presidents,[87] the Minister may now command both disciplinary spokesmen and public prosecutors to trigger actions against judges for their judicial activities. In fact, there were recently several instances in which judges who decided against the expectations of the ruling party were threatened with or subject to disciplinary proceedings or prosecuted for the misuse of power in criminal trials.[88] Moreover, the Spokesman of the National Council of the Judiciary, who was very critical of the judicial reform, experienced excessive review of his property statements by the Central Anti-Corruption Office.[89]

For a long time, the output of independence on the level of the judiciary was considered adequate. It has been a shared view that the judiciary could decide cases so that no actor is constantly preferred. This was demonstrated by the relatively high number of acquittals and lost liability cases against the State Treasury.[90] However, the line between the output of independence at the level of individual judges and their autonomy resulting from their position within the existing structure of the judiciary has always been thin. Although judges could enjoy de jure autonomy in adjudication, they were actually constrained by decisions of other (higher) courts due to a peculiar system of judicial promotion that depends on the

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[85] According to the Constitutional Tribunal, delegation of judges is not unconstitutional *per se* provided that it is based on their consent and that they remain detached from the adjudication. Judgment of 15 January 2009, Case no. K 45/07.

[86] Act of 28 January 2016 – Law on the Prosecutor's Office, Official Journal 2017, Item 177.

[87] To counteract this pressure, several NGOs, including two private associations of judges, established the Justice Defense Committee in June 2018 - http://www.inpris.pl/en/whats-going-on-at-inpris/article/t/powstal-komitet-obrony-sprawiedliwosci-kos/

[88] *Reform of the Judiciary in Poland Poses Risk to The Right to Fair Trial,* (March 2018), https://www.amnesty.org/download/Documents/EUR3780592018ENGLISH.PDF (gathering testimonies from judges who reported being subjected to disciplinary proceedings or who feared sanctions for their decisions in cases involving governing-party politicians or for their participation in protests demanding the independence of the judiciary).

[89] *'They're trying to break me': Polish judges face state-led intimidation*, GUARDIAN (June 18, 2018), https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation?CMP=share_btn_link

[90] Adam Bodnar & Łukasz Bojarski, *Judicial Independence in Poland*, in JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed 2012), 667-738, 668.

number of decisions overturned on appeal. In short, a high number of repeals may be grounds for the negative assessment of a judge by an inspector, which hinders a judge's promotion.

Since the Law and Justice party came into power, judges may have been feeling additional pressure to adjudicate according to the specific party line. In particular, judges could be feeling trapped by political controversy over the position of the Constitutional Tribunal and hesitate on whether to follow its decisions or become openly involved in a process of dispersed judicial review.[91] Although there has been an emerging consensus that judges do not have the power to declare statutes unconstitutional (since it is the Constitutional Tribunal that has a monopoly in this regard), commentators agree that such power is legitimate in cases when the legislator intentionally violates the Constitution or adopts laws contrary to existing constitutional interpretation.[92]

According to a study conducted by the European Network of Councils of the Judiciary among Polish judges, 48% of respondents agreed that the court authorities expected them to settle the case within a certain time. Thirteen percent of respondents admitted that they had to decide cases according to the internal guidelines of their peers, and 5% of respondents admitted that there was pressure by the court to decide a case in a particular way. Although the sample included only 621 judges and was not representative of the entire judiciary, it shows that judges experience different forms of internal pressure.[93]

In the same study, only 5% of respondents believed that cases were allocated in a way that could indicate a particular outcome, while 7% found that there was a risk of disciplinary sanctions for deciding a case in a particular way. Nineteen percent of respondents claimed that their decisions were influenced by the media, such as television, radio or the press, while the influence of social media was evident for only 2% of respondents. Interestingly, only one-third of the judges who took part in the survey were convinced that they could count on promotion on the basis of substantive criteria and in a transparent procedure. According to 21% of respondents, to be appointed as a judge depended on criteria other than qualifications and experience, while 36% claimed that judicial promotion was based

[91] Tomasz T. Koncewicz, *The Court is dead, long live the courts? On judicial review in Poland in 2017 and „judicial space" beyond*, VERFASSUNGSBLOG (March 8, 2018), https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/.

[92] Krzysztof Szczucki, *Komentarz do Artykułu 186 Konstytucji* RP, *in* KOMENTARZ DO KONSTYTUCJI (Marek Safjan & Łukasz Bosek ed 2016), para. 61.

[93] *Independence and Accountability of the Judiciary and of the Prosecution*, ENCJ Report 2014-2015.

on criteria other than qualifications and experience.[94] Further research will show whether the perception of the judges has changed after the judicial reform of 2017.

In comparison, the opinion poll conducted in 2017 indicates low social trust in the independence of courts and judges. Only 24% of respondents found Polish courts and judges to be independent in all or a majority of cases.[95] In contrast, 61% believed that judges are not independent at all or are independent occasionally. The answer to this query differed when respondents had personal contact with courts. In such cases, respondents tend to have more trust in the independence of the judiciary.[96] The Eurobarometer study carried out by the European Commission in 2018 showed similar results. Only 37% of Poles declared satisfaction with the level of independence of courts and judges in Poland, whereas the EU average was 56%.[97]

II. Accountability

Judges (including probationary judges) may be subject to disciplinary proceedings in the case of professional offences, including obvious and flagrant breach of the law and undermining the dignity of the office.[98] In principle, judges need to perform the judicial duties in accordance with their oath and preserve the dignity of the office both on and off duty. Disciplinary proceedings are initiated by the disciplinary spokesman *ex officio*, or at the request of the MoJ and the presidents of appellate courts. In this context, it is quite symptomatic that the government of Law and Justice led its crusade against judges, while emphasizing the privileged status of the judiciary in law and the practical lack of criminal answerability for their actions. According to government propaganda, judges are frequently involved in criminal activity and are not held accountable for their wrongs.

In fact, there were about 270 disciplinary proceedings held between 2013 and mid-2016 in which judges were charged with 289 disciplinary offences. It could be thus concluded that judges committing disciplinary offences is a marginal problem. The most frequent allegations concerned excessive length of time for providing written justifications of judgments or other delays, which usually resulted from work overload. Only in 17 cases were the judges charged with committing a crime, including 1 charge of corruption, 3

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[94] *Ocena polskiego sądownictwa w świetle badań*, Court Watch Foundation Poland (May 2017), https://courtwatch.pl/wp-content/uploads/2017/05/Raport-Fundacji-Court-Watch-Polska-Ocena-polskich-s%C4%85d%C3%B3w-w-%C5%9Bwietle-bada%C5%84-maj-2017.pdf

[95] CBOS, Opinion poll No 31, Warsaw (March 2017), https://www.cbos.pl/SPISKOM.POL/2017/K_031_17.PDF

[96] *Id* at 6.

[97] *Perceived independence of the national justice systems in the EU among the general public,* Flash Eurobarometer No. 461 (May 2018), https://data.europa.eu/euodp/data/dataset/S2168_461_ENG

[98] Article 107(1) ASOC.

charges of crimes against road safety, 2 charges of misuse of power, and 1 charge of document falsification. In 5 cases, judges were charged with minor offences. In 188 cases, disciplinary courts imposed sanctions on judges. In 24 cases, the courts did not impose any penalty due to the minor nature of the offence, and in 21 cases the proceedings were discontinued due to the limitation period. In 48 cases, the judge was acquitted.[99]

On the one hand, this data may show that the judiciary in Poland lives up to high legal and ethical standards. On the other hand, it may indicate that there are inherent barriers to conducting disciplinary proceedings against judges and to imposing sanctions on them. These barriers may be further related to the position of disciplinary spokesmen. Until recently, the NCJ could appoint the Disciplinary Spokesman and two Deputy Disciplinary Spokesmen of Ordinary Courts for a term of four years. Currently, this power has been granted to the MoJ, who may also appoint the Disciplinary Spokesman of the MoJ to carry out a case against an individual judge.[100]

The Disciplinary Spokesman and the Deputy Disciplinary Spokesmen of Ordinary Courts are authorized to initiate disciplinary proceedings in cases concerning judges of appellate courts, as well as presidents and vice-presidents of appellate and regional courts. In case of other judges, this role is played by deputy disciplinary spokesmen. Previously, the deputy disciplinary spokesmen were elected by court colleges for each appellate and regional court.[101] Currently, the Disciplinary Spokesman appoints the deputy disciplinary spokesmen from among three candidates elected by the general assembly of appellate and regional courts.

Disciplinary courts are appellate courts and the Supreme Court.[102] They hear disciplinary cases and decide on the immunity waiver. Under the previous system, judges in appellate courts were appointed to a case by drawing lots. Under the new rules, the MoJ appoints the disciplinary judges in appellate courts.[103] Their panels are comprised of three judges in the first instance and two judges and one lay judge of the Disciplinary Chamber of the Supreme Court in the second instance. The creation of the Disciplinary Chamber sparks considerable controversy due to its institutional autonomy from the First President of the

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[99] *Id* at 49-50.

[100] Article 112b(1) ASOC.

[101] In cases of the regional court judges, as well as the presidents and vice-presidents of district courts, the deputy disciplinary spokesman at the appellate court is the authorized prosecutor, and in cases of the district court judges and the probationary judges it is the deputy disciplinary spokesman at the regional court. Article 112 ASOC.

[102] Article 110 ASOC.

[103] The Minister of Justice entrusts the duties of a disciplinary court judge at the appellate court to judges who have at least ten years of practice as a judge after consulting the National Council of the Judiciary.

Supreme Court and special allowances for the work of individual judges in this Chamber (40% of the ordinary remuneration). In the opinion of "Iustitia", this change threatens the independence of judges. Therefore, "Iustitia" has proposed to make the records of disciplinary proceedings available on-line.

Disciplinary sanctions include admonition, reprimand, removal from a post (such as the president of the court), transfer to another court, and removal from office. The 2017 amendment added a new sanction: reduction of basic salary by 5% - 50% for a period of six months to two years. However, pursuant to the Act on the Supreme Court of 8 December 2017, the MoJ may also demand the resumption of any disciplinary proceedings concluded with a final decision either in favor or against a judge. This power may easily become a tool of political oppression against some judges.

In the view of "Iustitia", disciplinary judges should be either elected by the bodies of judicial self-government or chosen at random by judges from the respective court. The current situation being that the MoJ has both the power to appoint the disciplinary spokesmen and the disciplinary judges, while the rights of a judge in the disciplinary proceedings are less favorable than that of a defendant in a criminal trial, pose a very real threat to the independence of the judiciary.[104]

III. Transparency

In the existing legal framework, the public can learn about the activities of the Supreme Court from the annual report of the First President of the Supreme Court.[105] The annual report is also presented to the general assembly of Supreme Court judges, which can be attended by the representatives of other institutions and the judiciary. Presidents of lower courts have the duty to present their annual report to the president of the appellate court, who in turn conducts the MoJ evaluation for the effective management of all courts in an appellate jurisdiction.[106] Furthermore, directors general prepare annual reports on the activities of the courts and present them in the following order: The directors general at the lower courts in a given jurisdiction report to the director general of the appellate courts, who then reports to the MoJ.[107]

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[104] The response of the Polish Judges Association "Iustitia" to the White Paper on the Reform of the Polish Judiciary presented to the European Commission by the Government of the Republic of Poland, *supra* note 71, 51.

[105] Article 5(1) of the Act on the Supreme Court, Official Journal 2018, Item 5.

[106] Article 37(1) ASOC.

[107] Article 31a ASOC.

Although one can obtain public information on court activities on request,[108] the publicly available data and statistics are hard to comprehend.[109] In particular, there is scarce information in the public domain about the internal management of courts, including information about courts' spending. The media coverage of court practices is rather rare, except in cases concerning charges of maladministration or corruption.[110] Since November 2016, judges' property statements are published on the Internet website of appellate courts.[111] This measure aims to enhance trust in the judiciary and prevent corruption.

Until recently, only administrative courts had a comprehensive database of all decisions, and there was no general database of Supreme Court judgments or judgments of ordinary courts available on-line. Although such databases have been recently launched, they are still not complete or fully operational.[112] As a result, it is a conventional practice to use commercial (paid) services providing access to electronic databases that contain full texts of court decisions.

In addition to the deficient transparency of case-law, the method of allocating cases has not been transparent either. Until the recent reforms, heads of civil court divisions could decide about the composition of adjudicating panels and allocation of cases (in effect, they could alter the allocation based on the alphabetic order), while the criminal court divisions used random case allocation. The new law provides that all cases are allocated randomly by a computerized system. While random allocation of cases may indeed strengthen the independence of "rank-and file" judges from court presidents and heads of divisions, and indirectly from the MoJ as well,[113] the central system of random allocation of cases is supervised by the MoJ. The MoJ refuses to reveal the algorithm used to draw cases to the public. As a result, the public lacks information on how the system operates in practice. Notably, the system of random allocation of cases has not been introduced in the Supreme Court.

Undoubtedly, the most serious problem with transparency concerns the process of evaluating judicial candidates and their selection by the NCJ. The duty to provide written

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[108] Act of 6 September 2001 on Access to Public Information, Official Journal 2001, No. 112, Item 1198.

[109] *See* annual reports on the realization of the plan of activities by district courts.

[110] In December 2017, the media reported about the previous President of the Appeal Court in Cracow charged for accepting material benefits in exchange for the realization of public procurement contracts by external companies.

[111] Article 87(6) ASOC. Property declarations are published.

[112] For the database of the ordinary courts see - https://orzeczenia.ms.gov.pl/ The Supreme Court database is available at http://sn.pl/orzecznictwo/

[113] *White Paper on the Reform of the Polish Judiciary*, Chancellery of the Prime Minister (March 7, 2018), 38.

justification of decisions concerning individual candidates and the right to appeal the legality of individual decisions in courts was introduced in 2009 as a result of a judgment by the Constitutional Tribunal.[114] Eventually, the Act on the NCJ was amended to provide statutory criteria for the evaluation and selection of candidates for judges.[115] More recently, the problem of low visibility surrounding the Council's internal proceedings resurfaced again. While "Iustitia" proposed to provide online transmission of all plenary sessions and to introduce an advisory board at the Council,[116] the new law only requires that all plenary sessions be broadcast on-line. That is, unless the Council chooses to proceed with closed or private deliberations.[117]

Last but not least, the recent amendment to the Act on the NCJ that changes the mode of election of judicial members is a clear regress in the transparency of this process. Pursuant to the 2017 amendment, the Sejm voted on the list of 15 candidates, each of whom had the support of 25 judges. Nevertheless, the list of the judges who supported the respective candidates were not disclosed to the public, and there was no requirement to justify a particular candidature. Notably, the body of judicial self-government was excluded from this process, and most of the newly elected members have ties to the MoJ (as delegated judges or court presidents).[118]

D. The Role of Judicial Self-Government in ensuring the Principle of Separation of Powers and Democracy

I. Separation of powers

This article has argued that the democratic transformation and the recent reforms of the judiciary mark the rise and fall of judicial self-government in Poland. At the same time, it also notes that the scope of powers of key actors in judicial government has been determined by critical moments such as the conflict between the President of the Republic and the NCJ over judicial appointments.[119] In this conflict the President prevailed,[120] since

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[114] Judgment of 27 May 2008, Case no. SK 57/06.

[115] Articles 34-37 of the Act on the NCJ. In 2007, the Constitutional Tribunal found that the power of the NCJ to determine criteria for evaluation and selection of candidates for judges without a statutory basis is contrary to the Constitution. Judgment of 29 November 2007, Case no. SK 43/06.

[116] The Social Board at the Council would comprise several representatives of legal professions, law departments, civil society, and the Ombudsman in order to ensure the social control over the process of judicial appointments.

[117] Article 20(1) of the Act on the NCJ.

[118] Marcin Matczak*, The Rule of Law in Poland: A Sorry Spectacle,* VERFASSUNGSBLOG *(*March 1, 2018, https://verfassungsblog.de/the-rule-of-law-in-poland-a-sorry-spectacle

[119] In 2008, the President of the Republic, Lech Kaczyński, refused to appoint 10 judges recommended by the NCJ. He did not provide any reason for this decision. As the Presidential action was challenged before administrative

the NCJ does not have the power to overrule the President. As a result, individual judges (and candidates for judges) are left without an effective legal remedy.[121] The solution in this case is contrary to the OSCE Kyiv Recommendations, under which the executive branch's refusal to appoint judiciary candidates should be based only on procedural grounds and be reasoned.[122]

Still some of the controversies could be successfully settled due to the intervention of the Constitutional Tribunal, which laid down the standards for the transparency of the evaluation process of candidates for judges,[123] judicial immunity,[124] delegation of judges,[125] and their so-called "horizontal promotion",[126] the status of probationary judges,[127] or freezing the salaries of judges.[128] Other controversies regarding government plans

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courts, the Supreme Administrative Court found that it does not have jurisdiction over the acts of the President, which are not administrative in nature. Similarly, the Constitutional Tribunal discontinued the proceedings on procedural grounds. It found that it cannot review the constitutionality of the act which is specified in the Constitution, and not in a statute. *See* decision of the Constitutional Tribunal of 19 June 2012, Case no. SK 37/08, and decisions of the Supreme Administrative Court: I OSK 1872/12, I OSK 1882/12, I OSK 1874/12, I OSK 1883/12, I OSK 1875/12, I OSK 1890/12, I OSK 1873/12, I OSK 1891/12, I OSK 1878/12, I OSK 1879/12, I OSK 1885/12, I OSK 1870/12, I OSK 1871/12, I OSK 1887/12, I OSK 1880/12, I OSK 1881/12, I OSK 1884/12, I OSK 1886/12, I OSK 1888/12, I OSK 1876/12, I OSK 1877/12, I OSK 1889/12.

[120] For the second time, the conflict over the judicial appointments, yet also concerning persons who are already judges in lower courts, arose in 2016 during the term of office of President Andrzej Duda.

[121] In 2014, the rejected candidates filed applications to the European Court of Human Rights but their claims were also rejected as inadmissible.

[122] The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Kyiv 23-25 June 2010, http://www.osce.org/odihr/71178. *See* also a critical statement of the International Commission of Jurists of 25 October 2007, http://www.hfhrpol.waw.pl/precedens/aktualnosci/oswiadczenie-miedzynarodowej-komisji-prawnikow.html and the Consultative Council of European Judges adopted during the 9th Plenary meeting on 12-14 November 2008, http://www.hfhrpol.waw.pl/precedens/images/stories/Pdfy/deklaracja.pdf

[123] Judgment of 29 November 2007, Case no. SK 43/06.

[124] Judgment of 28 November 2007, Case no. K 39/07.

[125] Case no. SK 45/07.

[126] Judgment of 8 May 2012, Case no. K 7/10.

[127] Judgment of 24 October 2007, Case no. SK 7/06.

[128] Judgment of 12 December 2012, Case no. K 1/12.

diminishing the constitutional role of the NCJ were either dropped[129] or effectively blocked.[130]

The central point of controversy regarding the principle of separation of powers is the administrative supervision over the administration of justice in ordinary and military courts.[131] It is a recurring suggestion to entrust this function to the First President of the Supreme Court following the model of supervision over administrative courts.[132] This change would leave the MoJ with the power to decide about court organization and infrastructure, while moving some roles at the edge of administration and adjudication – like decisions on the number of judicial vacancies, judicial training, or the courts' budget - to the NCJ.[133]

While judicial self-government has been an important "check" over the executive branch's powers, the creation of the NCJ warranted that individual decisions concerning judges are institutionally separated from the judiciary. This is why the judicial appointments or promotions require the recommendation of the NCJ and the opinion of the general assembly of judges. Until recently, the opinion of the judicial self-government body was also required for the appointment and dismissal of court presidents. Further, the legislative power is restrained by the duty to consult the NCJ over draft legislation concerning the judiciary. However, the recent judicial reform has been implemented without thorough consultation with the NCJ or other stakeholders.

It should be noted however that for many years, the NCJ has had a dual role, and therefore somewhat of a vacillating position – on the one hand, it harmonized and stabilized the relationships between the executive, legislative, and judicial branches in areas concerning the independence of courts and judges, and on the other hand, it represented the administration of justice. Furthermore, in practice, the Council concentrated on matters that were vital for the members of the judiciary. Although the Council acted as a state

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[129] In 2008, the government proposed to create a separate competition commission that would be in charge of the selection of candidates for judges. The NCJ objected to having only the power of "presentment" of the candidates to the President of the Republic. The reform was never passed into law.

[130] The Act on the NCJ adopted in July 2017 provided that the NCJ presents two candidates for one judicial vacancy, thus leaving the final choice to the President of the Republic. This Act was however vetoed by the President of the Republic following the severe criticism of various experts who argued that it would make the constitutional role of the NCJ, and indirectly the judicial independence, illusory.

[131] Bodnar & Bojarski, *supra* note 90, 668.

[132] This postulate needs to be reassessed nowadays due to the reconstruction of the Supreme Court, and the increase of Presidential powers in the process of appointment of the First President of the Supreme Court.

[133] Stanisław Dąbrowski, *Kilka uwag o kondycji sądownictwa*, 2 KRAJOWA RADA SADOWNICTWA 46 (2010).

organ *de facto* representing the judiciary, it took on this role due to the lack of a centralized system of communication between several levels of judicial self-government.

Since the judicial reform of 2017, the NCJ cannot be regarded as the organ representing the judiciary, because the elected judicial members have a political mandate. The political capture of the NCJ resulted in a similar transformation to that of the Constitutional Tribunal, in that it became an ally of the government. Nevertheless, the representative function has been taken up by judges' associations who not only defend the judiciary against political pressure and attacks, but also inform the public about the opinions of the judiciary on issues concerning the court system. Pitifully, the government has not recognized the main associations of judges as genuine partners and fails to involve them in a meaningful dialogue when reforming the court system.

II. Democracy

The recent judicial reform was introduced under a slogan of democratization. The change of the mode of election of the judicial members of the NCJ, as well as the introduction of lay judges to the Disciplinary Chamber of the Supreme Court, could be thus defended as rationally related to this objective. However, the slogans of democratization may also easily overshadow the real motives of the government, which is greed for power and governing via conflict.[134] By calling judges a caste, a self-interested corporation, the government not only undermines the authority of judges, but also creates a clear division between the judges and society.

Nevertheless, the roots of the division between judges and society are deeper than the populist propaganda. They are due to the growing alienation of the judiciary, which has continued since the beginning of the transition from Communism to democracy. It was thus a viable political strategy to initiate a campaign against the judiciary, knowing that society does not trust the courts. On the one hand, society complains about the complexity of court procedures and seems not to know how courts work. On the other hand, communication between courts and society has always been deficient or missing.[135] These factors contribute to the shared perception that judges are beyond social control.

In general, the social perception of the judiciary in Poland may be explained in relation to the institutional performance measured by, among other things, the time needed for settling a case in court. The excessive length of court proceedings are considered by public opinion to be the most serious problem of the administration of justice in Poland. The

[134] Ewa Łętowska, *Sądy odarte z godności*, 8 *KULTURA LIBERALNA* 2017, (Feb. 21, 2017), http://kulturaliberalna.pl/2017/02/21/ewa-letowska-wywiad-sady-reforma/

[135] Joanna Lora, *Komunikacja sądów z obywatelami – badania empiryczne, wnioski, rekomendacje zmian* (2009).

European Court of Human Rights has also recognized it to be a systemic problem.[136] At the same time, there is a growing awareness that courts can remedy this problem. The number of claims for compensation for the breach of the right to a fair trial in a reasonable time increases every year. Finally, indicators of low societal trust in the judiciary and in judicial independence need to be viewed in light of the low trust in Polish society of the legal system as compared to other people. Surprisingly, Poles trust the legal system less than they trust other people.[137]

Part of the problem with the Polish judiciary is a consequence of the democratic transition, which was carried out primarily by legal means. In the opinion of Professor Adam Czarnota, the law has become a tool of reconstruction of public life and it was used by lawyers "to disarm the citizenry."[138] In practice, the citizens were effectively excluded from the process of law-making, as well as from the processes of its interpretation and application. This feeling of exclusion made people more susceptible to believe in the sincerity of the democratization slogan.

However, the low performance of the court system has to do with the excessive workload for the judiciary. This may also be linked to the transition to democracy. Many transitional problems such as reprivatization were to be solved in the courts and contributed to the delays in court proceedings. Additionally, the Polish judiciary inherited a specific legal culture favoring legal positivism and formalism. In Communism, the law was utilized and manipulated for political reasons, and in order to shield themselves from political pressure many judges took refuge in legal positivism. They were already trained to give priority to literal interpretation and avoided reading the law in a social context. The post-socialist legacy of the Polish judiciary could be also characterized by legal formalism, which helped judges to avoid making a final decision on the merits of a case. Even today, the administration of justice suffers from a lack of effectiveness because disputes are pending between court instances.

E. Conclusion

All social groups, regardless of their political leanings, recognize the need for judicial reform. According to the opinion polls, over 81% of respondents agree that the judiciary needs to undergo an institutional change.[139] However, the recent judicial reform has only

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[136] *Rutkowski and others v. Poland*, judgment of 7 July 2015, Appl, No. 72287/10.

[137] Ocena polskiego sądownictwa w świetle badań, *supra* note 94, 19.

[138] Adam Czarnota, *Prawnicy naznaczeni socjalizmem*, *GAZETA PRAWNA* (June 11, 2017), http://prawo.gazetaprawna.pl/artykuly/1049466,prawnicy-wymiar-sprawiedliwosci-czarnota.html

[139] CBOS, Opinion poll No. 112, Warsaw (September 2017), https://www.cbos.pl/SPISKOM.POL/2017/K_112_17.PDF

deepened the existing division in Polish society, the result of which is two opposite camps: the proponents of change (which includes the President of the Republic, Andrzej Duda, and the government, as well as the parliamentary ally of the Law and Justice party – the Kukiz 15' Movement), and its opponents (which includes the opposition parties, the Ombudsman, the First President of the Supreme Court and, paradoxically, the European Commission). In this conflict the European Commission is perceived not as a neutral arbiter, but a political actor, siding with the opposition.[140] Characteristically, the conflict developed two parallel narrations – in the first view, the government aims to remedy deficiencies in the administration of justice, while the opposition obstructs its actions; in the second view, the government violates the Constitution, and the rule of law, while the opposition and the EU attempts to stop the abuse of power.

There are a few important consequences of the reform and the harsh political attacks on the judiciary. First, society continues to manifest solidarity with judges and this credit of trust should not be wasted. Second, the judiciary realized that it needs to actively involve the public in the defense of the judicial independence and improve its communication with Polish society. Third, judges have lost their representation in the National Council of the Judiciary, and have to create alternative fora for expressing their positions vis-à-vis the government.[141] This has already been happening, as the bodies of judicial self-government have tightened their internal cooperation and called upon the government to withdraw the most critical elements of the reform.

Since the political capture of the NCJ, the Association of Polish Judges "Iustitia" has become the main independent representation of the judiciary vis-à-vis the executive and legislative branch. It formulates and communicates the opinions of the judiciary to the public. It also reacts to instances of political pressure concerning individual judges and rectifies false information disseminated by the media. In this respect, the Association of Polish Judges is protecting the image of justice and the reputation of the judiciary in society. It is also playing an important integrative role and setting standards of ethical conduct for judges who face new challenges to their independence. These standards assist judges facing the moral dilemma of whether or not to accept functions and positions offered to them by the MoJ, and how to generally reject conformity to political whims.

In sum, the main positive consequence of the reform is the integration of the judiciary in private associations of judges and other civic initiatives defending the independence of courts and judges, while the negative consequences are manifold. In the matrix of the new rules, it has again become an act of bravery to adjudicate against the interests and expectations of the ruling party. Judges need to learn how to deal with both political and

[140] 53% of respondents agree that the EU, European politicians and institutions are not neutral in this conflict.

[141] Note that the reform introduced rules that silence judges who wish to express their critical opinions about the judiciary in public. Article 89(1) ASOC.

media pressure. This situation may only contribute to their growing frustration, since the reform has not improved the working conditions in courts. Rather, it has increased the supervision of the MoJ over the administration of justice and diminished the role of judicial self-government. In this respect, it is a regress with respect to the principle of judicial independence, and a compromise of the model of the judiciary that was accepted after the overthrow of Communism.

Articles

Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland

By Patrick O'Brien[*]

Abstract

Although Ireland is often cited as part of the vanguard of countries adopting forms of judicial self-governance in the 1990s, this appearance can be misleading: the Irish judiciary are self-governing only in limited respects. The judge-led Court Service is in charge of court estate, non-judicial personnel and provision of information on the court system to the public. Many key matters – discipline, promotions and deployment – remain largely out of the control of the corporate judiciary. Judicial appointments are significantly at the discretion of the government. In the last decade, there have been significant moves towards a more corporate judiciary and these are reflected in the creation of a judges' representative body, the Association of Judges of Ireland, and a shadow Judges Council. There are currently proposals to create a new independent mechanism for appointing judges and to create a Judicial Council with a significant role in disciplining the judiciary.

The Irish experience highlights the importance of political and cultural factors in establishing and maintaining judicial independence and self-governance. Despite the significant role for the government in judicial appointments, and the presence of a culture of political patronage in these appointments, there is nonetheless a robust culture of *individual* judicial independence once judges have been appointed. The creation of the Courts Service in 1999 was a significant transfer of administrative power to the judiciary but it was approved without demur by the political branches, who welcomed the depoliticization of controversial decisions about court estate. Conversely, reforms to judicial appointments have been weak because politicians saw value in maintaining a relatively harmless form of political patronage, and proposals for a Judicial Council that have agreed in outline for two decades have yet to be enacted, apparently because they lack sufficient political salience. The defence of judicial independence, and the creation of robust institutional mechanisms for defending it, ultimately requires the goodwill of politicians.

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A. Introduction

The Irish judiciary are self-governing only in a limited respect. Just as in many other common law countries and 'old' democracies, judges historically controlled only their own judgments, court rules and the case listing process. Since 1999 they have formally led the Courts Service, controlling the administration and management of the courts, but relations between the judiciary and Government still appear to play our largely informally, through quiet back-channel communications about pay and conditions, or legally, through court judgments that have enforced a very robust understanding of the separation of powers. There are significant legal protections for the judiciary in the Constitution and statute, and robust cultural respect for judicial independence within politics. Ireland does not, however, fit into any neat theoretical framework that explains either its current judicial arrangements or processes of reform. Judicial administration is a patchwork that has developed in two very broad stages. The initial stage – of (relatively benign) neglect – arose immediately after independence from the United Kingdom in 1922. It was to last for eight decades. The second stage – of *ad hoc* reform – began in the mid-1990s. This reform stage was driven initially by responses to specific problems (some political, some technocratic) but in the last decade has taken place against a backdrop of institutional restlessness that has affected Irish politics in general as a result of the economic crisis that unfolded from 2007 onwards. The economic crisis prompted a crisis of relations between judges and the political system. Although relations appear to have been mostly repaired the system remains in flux, and new reforms (to judicial appointments, and judicial self-governance) are currently being debated. At this moment, Ireland appears to be moving towards a model that mixes judicial self-governance in some areas with greater formalization, independence and depoliticization in others.

This article argues that Ireland confirms the general conclusions in the literature on judicial independence: that a culture of independence and political respect for the role of the judiciary is more important than formal controls. Nonetheless, Ireland is a small jurisdiction in which relations between judges and the government have proven to be acutely dependent on personality. Reform, in particular, only happens where there are significant *political* reasons to justify it. Part B of the paper aims to give the reader an overview of the Irish judicial system, and sketches out key institutional features (together with some proposed reforms) as well as the operation of the separation of powers doctrine. This sketch is set against data on public trust in the judiciary in Ireland. Part C will focus on the processes of court reform, drawing on the political history of reform efforts to show that reform only occurs where politicians can be convinced that it is in their interests to sponsor it. Part D will show that judicial independence in Ireland is potentially fragile and dependent to a significant extent on good personal relationships between politicians and judges. The essential relationships between government and the judiciary can be difficult to operate if personal relationships break down (as they did between 2011 and 2013). The article concludes that Ireland exemplifies the paradox of judicial independence:

judicial independence aims at isolating judges from politics, but depends for its survival on politics and personality.[1]

B. Judges and the court system in Ireland: a sketch

I. Key institutions, agencies and functions

The traditional core judicial functions in Ireland are the conduct and disposal of cases in court, case listing (allocation of cases to judges) and the regulations of court processes and procedures through the rules of court. Within this environment, the key players are the Chief Justice and the Presidents of the District Court, Circuit Court and Court of Appeal.

Figure 1: Structure of the Irish court hierarchy (with head of court)

These judicial leaders have a role in case listing and take seats *ex officio* on the Board of the Courts Service. They also have an informal role in relation to discipline and representation of the judiciary and their courts with the political branches of government. However, the Chief Justice and Presidents have little or no management function in respect of their judicial colleagues, and none in relation to deployment, promotions or appointments (although it is proposed that they will have a role on the new Judicial Appointments Commission; discussed below). Through the common law system, Ireland has inherited a very strong cultural conception of *individual* judicial independence, which has traditionally overshadowed corporate or collective judicial independence. There is thus

[1] For the argument that judicial independence is ultimately a political achievement, *see* GRAHAM GEE *ET AL*, THE POLITICS OF JUDICIAL INDEPENDENCE IN THE UK'S CHANGING CONSTITUTION (2015).

minimal *internal* accountability owed by individual judges to their court President or to the Chief Justice. As a retired senior figure in the Courts Service put it:

> [I]f I had a concern or worry about a judge I had no one to go to. … I could go to the president, but the president isn't a manager in the sense that every judge is independent … A lot of people think that presidents can discipline but they can't.[2]

The only formal mechanism for judicial discipline is the impeachment process under Article 35.4.1 of the Constitution, which requires a vote by both houses of the Oireachtas (Parliament). This process has been threatened on two occasions in the last twenty years (see section C.III below) but has never been used. There are no powers to discipline judges for more trivial misbehavior that would not justify dismissal.[3] For all other judges there are no disciplinary mechanisms whatsoever and the only option (short of impeachment) open to a Chief Justice or court President to change a judge's behavior is informal persuasion.

Beyond the core court-related functions the Irish judiciary is self-governing only in a limited respect, controlling only the Courts Service which since 1999 has managed court estate and non-judicial personnel. Key functions of administration, appointment, discipline and training and representation were traditionally managed through informal back-channel negotiations with the Government, were conducted exclusively by the executive, or simply did not exist (see Figure 2).

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[2] Interview with the author.

[3] There are limited powers to investigate the behavior of District Court judges (but not to discipline them): Courts of Justice (District Court) Act 1946, § 21, Courts (Supplemental Provisions) Act 1961, §§ 10(4) & 36(2). Investigation may be done at the request of the Minister or by the Chief Justice or District Court President acting on their own initiative. The power applies only to the District Court and has been used very rarely. *See* RAYMOND BYRNE *ET AL*, THE IRISH LEGAL SYSTEM (2014), 189; Laura Cahillane, *Ireland's System for Disciplining and Removing Judges* 38 DUBLIN UNIVERSITY LAW JOURNAL 55 (2015).

Figure 2: Changes to Irish judicial self-government over time

<table>
<tr><th></th><th>Judicial discipline</th><th>Judicial representation</th><th>Judicial standards/ training</th><th>Court management/ administration</th><th>Judicial appointments</th></tr>
<tr><td>Pre-1990s</td><td rowspan="4">No formal investigation or disciplinary structure

Impeachment (legislature)</td><td rowspan="3">No formal structure

Informal back-channel negotiations.

Occasional public reports by ad hoc judicial committees</td><td>None</td><td rowspan="2">Department of Justice & local authorities</td><td>Government</td></tr>
<tr><td>1990s</td><td rowspan="3">Committee for Judicial Studies (1996)[4]</td><td rowspan="3">Judicial Appointments Advisory Board (JAAB) (1995) (nominating body)

Government (appointing body)</td></tr>
<tr><td>2000s</td><td rowspan="4">Courts Service (1999)</td></tr>
<tr><td>2010s</td><td>Association of Justice of Ireland (AJI) (2011)

Interim Judicial Council (2011)

Informal Govt-judiciary ‘Working Group’ (2013)</td></tr>
<tr><td>2019?</td><td>Impeachment (legislature)

Judicial Council</td><td>Judicial Council</td><td>Judicial Council</td><td>Judicial Appointments Commission (JAC) (recommendation)

Government (appointment)</td></tr>
</table>

[4] Formerly the Judicial Studies Institute. It is currently envisaged that the Committee for Judicial Studies will continue operating under the auspices of the Judicial Council when it is created.

Relations between the judiciary and the Government were historically conducted in one of two ways. Matters of high constitutional principle have been defined through the jurisprudence of the courts, which have created a very rigorous doctrine of the separation of powers. Administrative, technocratic and 'trade union'-type discussions between judges and were conducted completely out of public view, according to a model described by O'Dowd as 'presidential'.[5] Key figures on the judicial side were the Chief Justice and the court Presidents, and on the Government side were the Minister for Justice (as the line minister) and the Attorney General (as leader of the Bar).[6] The common mechanism for communication to the Government was a letter from the Chief Justice to the government, sent through the Attorney General.[7] For most of the history of the state these quiet informal mechanisms functioned well. Ireland is a small country and members of the legal and political elite would often be known personally to each other. Judges enjoyed considerable influence over the government behind the scenes and each side was able to respond flexibly and pragmatically to matters of joint concern. During the financial crisis of the last decade, however, these traditional channels of communication broke down, sometimes completely, and relations have not completely recovered.

Beyond the traditional core of judicial functions, the Courts Service is the only significant judge-led part of the justice system. Prior to its creation in 1999, court estate was managed by the Department of Justice and by local authorities. Court staff were part of the Department of Justice; although lines of responsibility between the Department and court staff were badly fragmented. These disparate responsibilities and staffing arrangements were all unified in a judge-led Courts Service created as a state agency in 1999. The core responsibilities of the Service are to

(a) manage the courts,
(b) provide support services for the judges,
(c) provide information on the courts system to the public,
(d) provide, manage and maintain court buildings, and
(e) provide facilities for users of the courts.[8]

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[5] John O'Dowd, *Speaking to power: mechanisms for judicial-executive dialogue* in LAURA CAHILLANE *ET AL* (EDS), *JUDGES, POLITICS AND THE IRISH CONSTITUTION* 155 (2017).

[6] In Ireland the Attorney General is appointed by the Government as its chief legal advisor and is not a serving politician or a member of the Cabinet: *see* art. 30 of the Constitution of 1937.

[7] David Fennelly, *Reluctant reformers? Formalizing judicial regulation in Ireland* in REGULATING JUDGES: BEYOND INDEPENDENCE AND ACCOUNTABILITY (Richard Devlin & Adam Dodek ed. 2016) at 222.

[8] § 5, Courts Service Act 1998.

Day to day management of the Service is conducted by its Chief Executive and staff. The Chief Executive is recruited and appointed by a Board which is chaired by the Chief Justice and which contains a judicial majority. Two Chief Executives have served so far; both have been former civil servants.[9] The Board is also responsible for strategic planning and policy. It comprises 18 members, of which ten are judges: the Chief Justice (as chair), the President of each court and a second judge from each court elected by the members of that court.[10] The Service is an agency of the Department of Justice and its budget is secured as part of the Department of Justice vote in the Oireachtas. The Service is accountable to the Oireachtas through its Chief Executive and, politically, through the Minister for Justice. The separation of powers culture in Ireland is such that it is considered inappropriate for judges to appear before parliamentary committees, and the lines of accountability for the new Service were carefully drawn so that judges were protected from having to account for their judicial functions.[11] Oireachtas committees may summon the Chief Executive to give evidence, but they may not require him to account for judicial functions or the conduct of court proceedings. In the event of a disagreement about whether a request relates to a judicial function or to court proceedings, the matter may be remitted to the High Court for a binding determination.[12]

Through its responsibility to provide support services to the judiciary, the Courts Service also provides administrative services to court rules committees (which as a core judicial function sit outside the organization), and to a number of standing committees on issues such as court estate and family law. The Service has taken a creative approach to its responsibility to provide services and information, such as its sentencing information initiative. The Courts Service Act 1998 also gave the Courts Service an advisory role in relation to court policy. This has given judges an input into policy for the first time, and led, for example, to the creation of a Commercial Court. At an unofficial level judges have had input into some courts-related draft legislation.[13] Also supported by the Courts Service is the Committee for Judicial Studies. Established by then Chief Justice Liam Hamilton in 1996, this Committee is responsible for education and training for the judiciary.[14] The

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[9] The first Chief Exectuve, PJ Fitzpatrick, was a former senior health service executive, and the second, Brendan Ryan worked for most of his career in court administration. Note that I am using 'civil servant' in its generally understood sense. There is a technical distinction between 'civil servants' and 'public servants' in Irish public administration but it is not relevant to this discussion.

[10] § 11 of the 1998 Act, *ibid*, (as amended by § 57, Court of Appeal Act 2014).

[11] *See* Robert Hazell and Patrick O'Brien, *Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster* (2016) PUBLIC LAW 54, 58.

[12] § 21 of the 1998 Act.

[13] Information from interviews. The advisory power is contained in § 6(f) of the 1998 Act. For an example of innovation on the part of the Service *see* http://www.irishsentencing.ie [last accessed 15 September 2017].

[14] The Committee was formerly known as the Judicial Studies Institute and was established to fulfil a very limited mandate to train judges provided for in the Courts and Court Officers Act 1995 (§§ 21 and 48 of the Act).

Committee is funded by the Minister for Justice[15] with administrative support provided by the Courts Service. The Committee provides training courses and manuals for the judiciary, as well as a specialist journal. However, the Committee has 'extremely limited financial resources and is accordingly unable to provide the type of continuing training and education that is common in other jurisdictions'.[16] Other than for newly appointed judges, training is not mandatory.[17]

The functions of the Courts Service do not extend to representation of the judiciary. Nor does the Service have any power in relation to judicial discipline (discussed further below). There is currently, following a serious rupture in relations between the government and the judiciary in 2011, a non-statutory interim Judicial Council which aims to represent the judiciary and also providing a structure for managing judicial standards, education and ethical issues. There is also the Association of Judges of Ireland (AJI), which was established to provide representation for judges to the government and in public debate. The Council and the AJI were established on the same day. Whereas the interim council comprised the entire judiciary, the AJI attracted membership from approximately 80% of judges. After an initial flurry of activism from the AJI, the more militant of the two bodies, and some initial difficulties balancing the organizations (discussed below), it appears that the interim Judicial Council has become the more important body for organizing and representing the judiciary.

Legislation currently before the Oireachtas will make significant changes to current arrangements. The Judicial Council Bill 2017 will create a Judicial Council that will give judges control over their own training, organization, representation and discipline. The Council will be chaired by the Chief Justice and every judge will automatically become a member. The remit of the proposed Council over judicial discipline is central to the proposal. A committee of the Council (the Judicial Conduct Committee) will be empowered to accept complaints and if necessary to refer them to a panel comprising a mixture of judges and laypeople for investigation.[18] Where appropriate, the Committee may issue reprimands and/or direct judges to undertake further training. In serious cases, the Committee may refer a case to the Minister for Justice with a recommendation to initiate the procedure for impeachment under Article 35.4.1 of the Constitution. As in the case of the Courts Service, the Council will be made accountable to the Oireachtas through its

[15] § 48 of the 1995 Act.

[16] As the website for the Association of Judges of Ireland puts it: https://aji.ie/supports/judicial-education/ [last accessed 15 September 2017].

[17] § 19 of the 1995 Act.

[18] Chapter 5 of the Judicial Council Bill 2017.

Secretary, rather than a judge, and the Secretary may not be required to account for court proceedings or the exercise by judges of their judicial functions.[19]

Judicial appointments were historically an exclusively political domain in Ireland. Under the Constitution judges are formally appointed by the President of Ireland on the recommendation of the Government. The choice of judges to appoint is thus made by the Government.[20] In practice, the choice was controlled by the Taoiseach, Minister for Justice and Attorney General, who would discuss the matter in advance and present the Cabinet with a nomination that had already been agreed. [21] As a result, judicial appointments were partly a facet of party political patronage exercised by the government; especially at District Court level, where it was not unheard of for prospective candidates to lobby for positions. The relationship between politics and appointment is complex and subtle, however. Political affiliations appear to become less important above the District Court, and especially for senior appointments. Carroll-MacNeill reports that judges, politicians and commentators generally accepted that judges were and are primarily appointed on merit. It is difficult to be definitive, but it appears that political connections with the governing party might be helpful to a prospective candidate as a tiebreaker with other equally qualified applicants, but are not otherwise essential or decisive.[22]

Since 1994, the Government's discretion over judicial appointments has been constrained, although only slightly. Following a political controversy, the Judicial Appointments Advisory Board (JAAB) was established to recommend candidates for appointment by the Government. The Board is chaired by the Chief Justice and the President of each court is a member *ex officio*, giving judges five positions and so significant influence. The Attorney General is also an *ex officio* member of the Board and there are representatives of the Bar Council and the Law Society,[23] giving the legal profession a significant majority (eight) on the eleven-member Board.[24] The role of the Board is, however, very limited. When the Board conducts a selection exercise it is required, firstly, to submit the name of each

[19] § 28 of the Judicial Council Bill 2017.

[20] Art. 35.1 read with art. 13.9 and art. 13.11 of the Constitution of 1937.

[21] JENNIFER CARROLL MACNEILL, THE POLITICS OF JUDICIAL SELECTION IN IRELAND (2016), 105–6. *See* also PAUL BARTHOLOMEW, THE IRISH JUDICIARY (1971), 31–33.

[22] CARROLL MACNEILL, *ibid*, at 107 and 137–8. Where there is a coalition government, there has generally a loose agreement about how decisions about judicial appointments should be distributed. Carroll MacNeill notes also that political affiliations have become weaker in the general population in recent years, so might be expected to play a less prominent role in contemporary appointments if candidates have correspondingly looser political connections (at 107–8).

[23] The Bar Council is the professional organisation for barristers and the Law Society the professional body for solicitors in Ireland.

[24] § 13(2) of the 1995 Act, as amended by § 12(b) of the 2014 Act.

person who has applied for the vacancy to the Minister for Justice and, secondly, to recommend to the Minister *at least* seven candidates for the vacancy.[25] The Government is not required to appoint from the list submitted by the JAAB[26] and as a result its discretion over judicial appointments has been left almost completely intact. An early political convention developed to the effect that the Government should, absent some compelling reason, select from the within the JAAB list. This convention was, however, rendered irrelevant by a policy decision by the Board in the early 2000s to begin recommending all candidates it considered suitable. This decision, apparently reached out of concern that to do more would impose unconstitutional constraints on the Government's freedom to appoint judges, limited the JAAB's role to that of a screening body.[27] The Government will not appoint someone who the Board has declined as unsuitable, although in 1998 the Board threatened to resign *en masse* when the Government proposed to appoint a candidate it regarded as unsuitable.[28] There is some indication that the Board reversed its policy somewhat in recent years, recommending fewer candidates[29] and for its Court of Appeal exercise in 2016 it reported to the Government that there was no candidate it could recommend.[30] The JAAB has no role in the promotion of serving judges, with the result that such promotions automatically entail that the Government ignores any JAAB recommendation. The vast majority of Supreme Court appointments are of serving judges and so the JAAB has little or no influence over appointments to that court, which remain largely unregulated.[31] Section 34 of the 1995 Act provides that the Government shall first have regard to serving judges when considering candidates for the office of Chief Justice or court President.

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[25] § 16(5) of the 1995 Act. CARROLL MACNEILL, *supra* note 21, 113-6, gives an account of the processes within the Board, although she notes that its practices are opaque. It has the power to conduct interviews but has never done so, with the result that the process is entirely paper based, using an application form and CV. The practice is that the Chief Justice will open discussions on a candidate, followed by the other judges in order of seniority and with particular attention paid to the views of the President of the court to which the recruitment exercise relates and then the other members of the Board. Once a shortlist is created, the professional bodies are contacted to ensure that the recommended persons are of good professional standing. The Secretary of the Board then conveys its recommendations to the Minister.

[26] § 16(6) of the 1995 Act requires only that the Government consider candidates recommended by the JAAB before others.

[27] CARROLL MACNEILL, *supra* note 21, 129.

[28] David Gwynn Morgan, *Selection of Superior Judges,* 22 IRISH LAW TIMES 42 (2004).

[29] CARROLL MACNEILL, *supra* note 20, 98.

[30] *See* e.g. Mary Minihan, *Ross unhappy at way Máire Whelan elevated to Court of Appeal*, The Irish Times, Jun. 13 2017.

[31] CARROLL MACNEILL, *supra* note 21, 100.

The Judicial Appointments Commission Bill 2017, currently before the Oireachtas, aims to reform the system by creating a Judicial Appointments Commission (JAC) modelled loosely on the organization of the same name in England and Wales. Unlike the JAAB, the proposed JAC will recommend only three names to the Government and there is a greater emphasis in the new Bill on the principles of merit and diversity in appointments. The JAC will also have greater lay representation than the JAAB, with a lay chair and six lay members and only three *ex officio* judicial members - the Chief Justice and the Presidents of the Court of Appeal and High Court – and only two on decision panels of the Commission.[32] The result is that judges will have less influence in the new JAC system than they have under the JAAB. This has been a source of considerable disquiet amongst the judiciary.[33] As with the Judicial Council Bill, accountability to the Oireachtas will be through the lay chair of the JAC and judges are protected from being made accountable for court proceedings or for the exercise of their judicial functions and the Bill also creates a new criminal offence of canvassing for judicial appointment or seeking to influence the process of the JAC.[34] As in the case of the 1995 Act, the new Bill will require the Government only to 'first consider' the recommendations of the JAC before making an appointment. Formally, at least, the Government will retain an almost unconstrained discretion to appoint a candidate of their choice. It may be that practice and conventions emerge to give shape to this discretion, but given the experience of the JAAB this cannot be guaranteed. Indeed the passage of the Bill itself is not yet guaranteed: it has recently been heavily amended at Committee stage, much to the Government's dissatisfaction, and at time of writing (May 2018) the Government is proposing further extensive amendments.[35]

II. Separation of Powers Doctrine

Given the relative absence of judicial self-governance in Ireland, the most important landmarks in the development of judicial power have been legal and doctrinal rather than administrative. That the power of the courts has never become a matter of serious controversy in Ireland is, given the extensive power of the judiciary, remarkable. The 1937 Constitution enshrines a Supreme Court with a strong power of judicial review over legislation enacted by the Oireachtas. The judicial review power lay dormant for a long time after independence under both the 1922 and 1937 Constitutions. Judges and barristers had been educated under the British system, which places central importance on

[32] §§ 12 and 13 of the Judicial Appointments Commission Bill 2017 [hereinafter 'JAC Bill'].

[33] E.g. Fiach Kelly, *Judges warned Varadkar Ross's reforms wouldn't work*, The Irish Times, Aug. 18 2017 and Mary Minihan, *Judicial reform plan a "deliberate kick in the teeth" for Chief Justice*, The Irish Times, Jun. 27 2017.

[34] § 25 and § 64, JAC Bill.

[35] E.g. Vivienne Clarke, *Charlie Flanagan says judicial bill 'in a difficult place'*, The Irish Times, Mar. 26 2018. Author's note: I made a submission to the Committee stage of the Bill and some of the amendments I proposed formed part of an earlier version of the Bill.

the sovereignty of Parliament and were slow to challenge politics and the legislature even though they were given the constitutional power to do so.[36] It was not until the first group of judges who had been educated entirely in the independent Irish system began to reach the apex of the judiciary in the 1960s that this changed. The 1961 Supreme Court appointments of Cearbhall Ó Dálaigh and Brian Walsh, both strongly influenced by American jurisprudence, led to rapid development of the personal rights guarantees in the Constitution and transformed the Irish Supreme Court from a backwater in Irish life into one of the most powerful apex courts in the world. The new judges were anxious to break away from what they saw as the constraints of the older British constitutional model. They felt that they had been given license to do so by the Taoiseach, Seán Lemass, who told them privately on appointment that he wanted the Irish Supreme Court to be more like its American counterpart.[37] This change in judicial outlook is perhaps the key moments in the development of the separation of powers in the Irish system. The seminal case of *Ryan v. Attorney General*,[38] in which the courts asserted a power to read 'unenumerated' personal rights into Article 40.3 of the Constitution, led to two decades of ambitious judicial activism that reshaped the relationship between the individual and the state in areas like the rights of the criminal accused and rights to privacy and family life.

The legitimacy of this activism went largely unchallenged in politics, partly because many of the rights that were read into the Constitution were relatively uncontroversial civil and political rights, such as to bodily integrity or to privacy. The lack of controversy may also be due to another feature of the Irish constitutional system. The central ideology of the Irish Constitution is the idea of popular sovereignty. The 1937 Constitution was approved by the people in a referendum and may only be amended by referendum. Since the 1970s, referendums have been held frequently and many referendums arise as a consequence of – or an attempt to reverse – decisions of the Supreme Court. The practice of using referendums as a backstop to prevent the courts running too far ahead of politics has made judicial activism less problematic from a democratic perspective than it has been in, for example, the United States. Nonetheless the Supreme Court over time became gradually more uncomfortable with its own activism – and particularly the *Ryan* doctrine – and changes of Supreme Court personnel led to a 'closing of the door' to new unenumerated rights. A more legally conservative reading of the Constitution became dominant, associated particularly with the appointment in 2000 of Adrian Hardiman who became an influential classical liberal voice on the Court. The contemporary Supreme Court takes a more literal and less expansive reading of the Constitution, and is often more deferential to the elected branches of government than its predecessors of the 1960s and

[36] Ronan Keane, *Judges as Lawmakers: The Irish Experience*, 4 RADHARC 81 (2003), 88.

[37] RUADHÁN MACCORMAIC, THE SUPREME COURT (2016), 78.

[38] *Ryan v. Attorney General* [1965] IR 294

1970s.[39] This step *back* from rights-based activism represents a further significant change to the separation of powers; albeit one initiated by judges themselves.

Judges have also been willing to defend their own independence through their judgments. A highly robust doctrine of the separation of powers has been used to prevent encroachment by the political branches on core judicial functions like sentencing. This has been respected by politicians even where it was controversial, as in the *Abbeylara* decision in which the Supreme Court held that the finding of fact was an inherently judicial function and so that Oireachtas committees had no power to make findings of fact in their inquiries – a significant limitation on what is a common investigative power in other parliaments.[40] Finally, the courts have been willing to defend the role of the people and the democratic aspect of the Constitution, as in the *Crotty* decision, in which the Supreme Court held that any major amendments to EU treaties must be put to the people in a referendum.[41]

III. Public confidence in the judiciary in Ireland

The Irish judiciary have in traditionally enjoyed robust public confidence. Longitudinal data on public confidence in the judiciary are hard to come by, as this is not routinely the subject of public surveys in Ireland, but available data suggests a positive view of the judiciary. Ireland is consistently ranked in the top ten countries in the world for perceptions of judicial independence by the World Economic Forum Global Competiveness Survey.[42] These figures appear to have been unchanged by the economic crisis or the difficult politics that surrounded judicial salaries from 2009 onwards. The OECD recorded figures for public confidence in the judiciary at 65% in 2007 and 67% in 2014.[43] Eurobarometer figures for public perceptions of judicial independence in Ireland were 75% in 2016 and 74% in 2017.[44]

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[39] *See* e.g. the judgment of Mr. Justice Hardiman in *Sinnott v. Minister for Education* [2001] 2 IR 545. This judgment is quoted approvingly by Ronan Keane, *supra* note 36, then recently retired as Chief Justice, at page 95.

[40] *Maquire v. Ardagh* [2001] 1 IR 385. A referendum to reverse this decision was held at the same time as the referendum on judges' pay but was rejected by the people.

[41] *Crotty v. An Taoiseach* [1987] IR 713. *See* also *McKenna v. An Taoiseach (no. 2)* [1995] 2 IR 10 which significantly restricted the freedom of the Government to spend public money in the context of referendum campaigns.

[42] Figures from World Economic Survey Global Competitiveness Survey produced between 2000 and 2017 score Ireland at 6.3 or 6.4 out of a possible 7, and put the country between 3rd and 8th in the world on this measure.

[43] OECD, *Government at a Glance 2015* (2015), Chapter 12: Serving Citizens. Available at: https://stats.oecd.org/Index.aspx?DataSetCode=GOV_2015 [last accessed Sept. 15 2017].

[44] Flash Eurobarometer 435 (February 2016) and 447 (January 2017), *Perceived independence of the national justice systems in the EU among the general public*: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/77652 [last accessed 15 September 2017].

Figure 3: Trust in justice & political parties, with life satisfaction (Eurobarometer 2000-2017)

Irish statistics on trust in the justice system are weaker (see Figure 3)[45] but significantly outperform equivalent results for politics. Taking these statistics together, we can hypothesize that trust in the judiciary and judicial independence have remained reasonably robust, but there was a noticeable decline in trust in the justice system between 2010 and 2014 followed by a recovery. During the same period there was an acrimonious public debate in Ireland about whether judges' salaries should be reduced (discussed in Part D below). The decline in trust in judges at this time may indicate that the difficult politics associated with the salary issue damaged the system. There is anecdotal that some judges were heckled by the general public – and on one occasion by a juror – about their salaries.[46] Note, however, that this was a period of extreme economic downturn in Ireland.

[45] Figure 3 uses the figures for 'tend to trust' in response to survey questions on 'justice/the legal system' and 'political parties' from Eurobarometer surveys from 2000-2017. The third figure adds together the 'very satisfied' and 'fairly satisfied' responses to the survey question 'One the whole are you very satisfied, fairly satisfied, not very satisfied or not at all satisfied with the life you lead?' Data taken from http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/General/index. [last accessed Sept. 15 2017.]

[46] *See* MacCormaic, *supra* note 37, at 368.

Self-reported life satisfaction also declined steeply during the same period (see Figure 3). A similar decline appears to have occurred in 2002-2003, coinciding with a similar decline in the life satisfaction figures and a (less severe) economic downturn. Trust in institutions appears to be significantly correlated with factors that are not connected to the performance of those institutions, such as life satisfaction and education.[47] The Eurobarometer figures for perceptions of judicial independence are also significantly influenced by levels of education.[48]

Anecdotal evidence suggests that general public awareness of self-governing judicial institutions in Ireland is very low, and it seems unlikely that the role that they play has any significant effect on public trust in the judiciary. This is especially the case given the effect that external factors such as education and life satisfaction appear to have on trust in this context. However, the creation of the Courts Service has allowed the judiciary to improve the public image of the courts through improved facilities and have increased the transparency of the courts system through the Courts Service website and annual reports. It is possible that these changes have played a small role in enhancing public trust and improving the legitimacy of judges and the courts.

C. The politics of judicial reform

Literature on judicial independence emphasizes the importance of cultural factors over and above formal rules protecting the function and status of judges or creating elaborate systems for judicial self-governance. Not only is *de facto* judicial independence more important to good governance than *de jure* judicial independence, but there is not always a direct connection between the two.[49] As the 'least dangerous branch',[50] judges are dependent on the political branches of government for the 'purse' and the 'sword': for provision of resources and enforcement of judgments. The Irish system, as discussed in the last section, appears to bear this analysis out. Ireland has a robust *de facto* culture of

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[47] *See* e.g. Steven Van de Walle & John Raine *Explaining Attitudes towards the Justice System in the UK and Europe* (2008) MINISTRY OF JUSTICE RESEARCH SERIES 9/08, 30.

[48] *See* Flash Eurobarometer 447, *supra* note 67. 63% of those who finished school before the age of 15 rated the independence of Irish judges as good or higher, whereas 79% of those who finished at above the age of 20 did so.

[49] There is a significant literature on the relationship between *de facto* and *de jure* independence. *See* eg William Landes and Richard Posner, *The Independence Judiciary in an Interest-Group Perspective* 18 JOURNAL OF LAW AND ECONOMICS 875 (1975). Charles Cameron, *Judicial Independence: How Can You Tell It When You see It? And Who Cares?* in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen Burbank & Barry Friedman ed. 2002); Yash Vyas, *The Independence of the Judiciary: A Third World Perspective* 11 THIRD WORLD LEGAL STUDIES 127 (1992); Stefan Voigt & Bernd Hayo, *Explaining De Facto Judicial Independence* 28 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 269 (2007); David Kosar, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016); Gee *et al*, *supra* note 1, chapter 2.

[50] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986).

judicial independence despite its comparative lack of structures for judicial self-governance in areas such as internal discipline and appointments. The system has historically depended on good relations between politics and the judiciary, and a culture of restraint on both sides, to function. However, Ireland also shows the limitations of this culture when it comes to reforming and improving the systems for managing judges and the court system. Reforms have been episodic, reactive – to controversy, or to technocratic concerns – and highly responsive to the personal projects of senior judges and politicians. As the examples in this section show, reforms to the judicial system depend on goodwill and investment from both politicians and judges to succeed and arguably this has been forthcoming in only one case: the establishment of the Courts Service.

I. Judge led reform: The Courts Service

The process of creating the Courts Service began with a *Working Group on a Courts Commission* chaired by the Supreme Court judge Susan Denham. The emphasis in the Commission's 1996 report was on efficiency, coherence and coordination. It focused on improving the 'client' experience in the light of massive increases in the case load and cost of the court system in the previous decade, the fragmentation of administrative structures, and the generally poor condition of the court estate. [51] The courts were the 'poor relation' in the Department of Justice's responsibilities and lines of authority within the civil service were sometimes chaotic. The benefit to judges was clear: a coherent and service-oriented courts system that could engage in more strategic planning and which was responsive to its users and those working in it. Not all judges were convinced of the merit of the proposals. Some were particularly concerned about their independence. The old system had been unsatisfactory in many ways but the Department had been scrupulous about never encroaching upon judicial functions. Ms. Justice Denham had to work hard to convince judges that the change was not a threat. The new Service won judicial support in a number of ways. As the senior figure in the Service interviewed noted, the presence of judicial board members elected by their peers reassured rank and file judges that their voices were heard. Subcommittees and *ad hoc* committees supported by the resources of the Service in areas such as finance, family law and building gave judges a sense of ownership of the system. And over time improvements to the courts and court administration provided physical evidence that the new system was working.

The Courts Service proposal also offered a significant benefit to politicians: it depoliticized the process of improving the court estate, which required politically sensitive decisions about which local courts should be closed. 'They transferred that function from the minister to us, the government did and mainly because the minister could never do it.'[52]

[51] *Working Group on a Courts Commission: First Report* (April 1996), available at http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/E33B888C196A85A980256DA6003459DA/$FILE/courts1.pdf [last accessed 15 September 2017].

[52] Interview with the author.

Part of the reason for the decrepit state of much of the courts system was the notoriously local focus of Irish politics, which made closing underused local courts difficult. Court infrastructure and court buildings were generally in a state of serious disrepair, but parliamentarians would lobby furiously to prevent closure in their area. Putting these decisions in the hands of the judiciary allowed ministers to present unpopular decisions as the responsibility of someone else. This came with some cost to democracy – court policy was immunized from the political lobbying that characterizes most of Irish politics – but lines of accountability for the Service through the Minister for Justice and the parliamentary committee system remained intact.

The Courts Service is a success story. It rationalized and improved the court estate, closing many of the more unsuitable buildings. It introduced computerization for the first time (prior to 1999 court administration was paper-based). The judiciary has benefitted from their control over courts' budgets and appear to have used this control to improve the performance of the court system significantly; for example, to change the court fee structure to increase the charges for commercially valuable court applications (such as licenses to sell alcohol). Long-term bickering over facilities between local judges, in particular, and the Department of Justice largely came to an end. The establishment of the Service was primarily a judge-led project, but it benefitted significantly from the goodwill of politicians, who saw clear political advantages to the politicization of a major area of public service provision. It benefitted also from the fact that it was set up during an unprecedented economic boom in Ireland. With access to capital to spend on infrastructure the new Service was able to achieve a great deal in a short time. Relations between judges and the government were severely tested when money became tight a decade later (discussed in Part II).

II. Reform through crisis: the politics of judicial appointments

Judicial appointments formed the first part of the post-1990 wave of reforms of justice administration in Ireland. The JAAB reform was not, however, a carefully thought out technocratic or principled reform but rather a back-of-the-envelope response driven primarily by a tussle over political patronage at the top of Government. In 1994 the Taoiseach (prime minister) and leader of the Fianna Fáil party, Albert Reynolds, sought to appoint the serving Attorney General, Harry Whelehan, as President of the High Court. In doing so he incensed his coalition partners, the Tánaiste (deputy prime minister) Dick Spring and the Labour Party who felt (based on prior coalition practice) that it was their turn to make a judicial appointment.[53] The Labour Party was also opposed to Whelehan personally, as they regarded him as a conservative Catholic damaged by his association

[53] CARROLL MACNEILL, *supra* note 21, 67.

with the notorious *X Case* two years earlier.[54] Matters were made worse by allegations that Whelehan had mishandled the extradition of a priest accused of abusing a child. Reynolds' proceeded in spite of the objections, but his failure to back down brought the coalition Government to the point of collapse and the parties went into crisis negotiations. One outcome of these was an agreement to create an independent system to manage judicial appointments. In the event the deal failed – the government collapsed anyway. Whelehan resigned a day after that, having been in office for only six days.[55]

The policy reform to judicial appointments remained in place but its political *raison d'être* had been the preservation of the coalition government. Without this justification it was a political orphan. Nowhere in the Oireachtas (not even in the Labour Party)[56] was there any appetite for placing meaningful constraints on the discretion of the Government over judicial appointments; widely regarded as a useful and essentially harmless piece of political patronage. Even Brian Cowen, the Fianna Fáil politician who had negotiated the deal, described the reforms as a 'charade' that was being continued only to spare the Labour Party (who had gone on to join a new coalition) the embarrassment of reversing their position.

> I was one of the authors of the principle if not the detail of the Bill. The Bill has been put forward as a proper aspect of judicial reform but it has nothing to do with such reform. … Any provisional agreement reached on this matter when I was a member of Government has nothing to do with judicial reform or efficacy of the courts system.[57]

The JAAB process as enacted in the Courts and Court Officers Act 1995 (as discussed above) left the Government's discretion almost entirely intact. The declared aim of the 1995 Act was not to introduce a form of judicial self-government – though it gave judges formal involvement in the appointments process for the first time – but to make appointments more independent from politics. The failure of the reform can be traced to the lack of political ownership of the proposals.[58] The rationale for the reform was not to improve the governance of the judiciary, but to fix a political crisis. In the absence of that crisis it was – for politicians at least – a solution that lacked a problem.

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[54] In 1992 Whelehan obtained an order from the High Court to prevent a suicidal 14-year old rape victim leaving the country for the purposes of an abortion. *Attorney General v. X* [1992] IESC 1, [1992] 1 IR 1 was successfully appealed to the Supreme Court and focused international attention on Ireland's highly restrictive abortion laws.

[55] MacCormaic, *supra* note 37, 306. The events also created some serious breaches of the separation of powers. Reynolds publicly criticized Whelehan and expressed regret at his appointment on the floor of the Dáil, and privately asked him to resign twice before the Government collapsed.

[56] Carroll MacNeill, *supra* note 21, 73.

[57] Dáil Éireann Deb., Nov. 29 1995, vol 459, no. 1, col 235–6.

[58] As Carroll MacNeill makes clear: *supra*, note 21, 70–77

There matters rested for two decades, until the general election of 2016 produced another unwieldy coalition, this time between the Fine Gael party and a loose alliance of independent politicians. One of those who joined the new Government was Shane Ross, a former journalist and a long-standing critic of the system for appointing judges.[59] As part of the coalition agreement negotiated with Fine Gael he insisted on reforms to make appointments independent from politics and the judiciary, and has repeatedly blocked appointments of judges until a new system can be put in place. The proposed reforms were given additional urgency by a further, though less serious, political crisis that mirrored that of 1994. In June 2017, outgoing Taoiseach Enda Kenny appointed the serving Attorney General to the Court of Appeal in his last significant act in office. The decision came after the JAAB had reported that it was not in a position to recommend anyone for the vacancy, but it was made despite the fact that a number of High Court judges had expressed an interest in the vacant position to the Attorney General herself.[60] The controversy around the appointment appears to have accelerated the publication of the draft JAC Bill several weeks later. Once again, reforms to judicial appointments in Ireland are being pushed forward as a result of coalition politics. The judiciary are fiercely resisting the new JAC. They are unhappy at its proposed lay (non-lawyer) chair and lay majority and have made their views known in public lectures and through letters to the Taoiseach and Minister for Justice. Lurking behind this concern over lay membership appears, at least in part, to be a concern that the new JAC could be used as a vehicle for ideological screening of potential judges. A politician and senior barrister interviewed in summer 2017 expressed serious concern that the commission could be taken over by political activists, with the result that judges might (for example) face questions about their attitudes to abortion.[61]

III. A judicial reform in want of a political crisis: the Judicial Council

As already discussed, aspects of the Irish court and judicial system – especially the regulation of discipline and of judicial standards and education – stand out for the fact that they lack any form of organization or regulation. There is little power to compel a judge to engage in training, and the only formal disciplinary power is the power of the Oireachtas to impeach a judge for stated misbehavior. Ireland has been fortunate, given this absence of regulation, that its judiciary has generally been of a very high quality, but nonetheless judicial discipline has taken Ireland to the cusp of constitutional crisis twice in the past 20 years. Proposals to remedy it through the creation of a Judicial Council have been in

[59] He is the co-author of SHANE ROSS & NICK WEBB, THE UNTOUCHABLES: THE PEOPLE WHO HELPED WRECK IRELAND – AND ARE STILL RUNNING THE SHOW (2012), which characterized the system for judicial appointments as corrupt cronyism.

[60] Conor Gallagher, *Several judges applied for vacant court position awarded to AG*, The Irish Times, Jun. 15 2017.

[61] Conversation with the author, August 2017.

circulation for almost as long, arising first in response to what became known as the Sheedy affair.

In October 1997 Philip Sheedy was convicted of dangerous driving causing death and sentenced to four years in prison. A year later a Supreme Court judge, Hugh O'Flaherty, met a member of Mr. Sheedy's family by chance and made an intervention in the case, asking the County Registrar for Dublin if it was possible for the case to be relisted for modification of sentence. O'Flaherty disputed that this was intended as an instruction but the Registrar appears to have interpreted it as such. A sequence of highly unusual and procedurally improper actions followed. The Registrar first invited Sheedy's solicitor to apply for the case to be relisted for modification of sentence. In November 1998, the case then came not before the original trial judge but before Judge Cyril Kelly. Kelly had no power to alter a sentence handed down by another judge, and made multiple procedural errors in the hearing itself. In particular, Kelly asked Sheedy's solicitor to have a medical report prepared on Sheedy so that it placed on file after the hearing, apparently to justify his decision to suspend the rest of the sentence. This would in effect falsify the record.[62]

The matter became a major public controversy in February 1999, when the Director of Public Prosecutions applied for judicial review of Judge Kelly's order. The Chief Justice, Liam Hamilton, investigated the matter. His report acknowledged that O'Flaherty's interest in the case was purely 'humanitarian' but concluded that his intervention in the matter was inappropriate, unwise and damaging to the administration of justice. Hamilton was even more critical of Kelly (by now a High Court judge) who had 'failed to conduct the case in a manner befitting a judge'. The report concluded:

> In conclusion, I must, and do, emphasize that I, as Chief Justice, have no jurisdiction, whether under the provisions of the Constitution or any Act passed by the Oireachtas, to make any recommendations arising out of the facts in this case and, I do not, for this reason, propose to do so.[63]

Following a brief negotiation with the Government, both judges and the registrar resigned. The Government, grateful that a constitutional crisis had been avoided and cautious about judicial independence, secured the passage of special legislation to provide for pensions for all three.[64] The Minister for Justice explained that the Government

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[62] It is not clear if this second report was ever in fact put on the record. On the Sheedy affair, *see* John O'Dowd, *The Sheedy Affair* 3 CONTEMPORARY ISSUES IN IRISH LAW AND POLITICS (2000), 103. *See* also Fintan O'Toole, *Unanswered questions about the Sheedy affair cannot be buried a second time*, The Irish Times, Jun. 24 2000.

[63] Extracted in BYRNE *ET AL*, *supra* note 3, 186.

[64] Shortly afterwards the Oireachtas (legislature) enacted special legislation to provide for pensions for O'Flaherty, Kelly and the registrar: Courts (Supplemental Provisions) (Amendment) Act 1999.

> … took the view that, from the information available, the errors of judgments by three individuals, … were quite serious but took into account that all three had taken the honorable course by resigning and had collectively helped to avert a difficult if not unprecedented position, from a constitutional standpoint.[65]

The Sheedy Affair led directly to proposals for reform. The Department of Justice proposed the creation of a Judicial Council to manage judicial discipline. This proposal had been foreshadowed several years earlier in a report by the Constitutional Review Group, which recommended that the Constitution should be amended to create a judge led Judicial Council that would be responsible for judicial discipline.[66] This report was accepted by the All-Party Oireachtas Committee on the Constitution in 1999.[67] The later judge-led *Report of the Committee on Judicial Conduct and Ethics* (2001) recommended that a Judicial Council with a broader remit for judicial conduct and ethics, for judicial studies and publications and for judicial pay and conditions. All judges would be members of this council and it would be led by the Chief Justice and heads of each court. This proposal would have required a referendum as it was constructed in such a way that an amendment to Article 35 of the Constitution was required. The Government accepted the recommendations and referendum legislation was prepared, but the amendment was withdrawn as opposition parties disagreed with some elements of the package.[68] The proposal ran out of steam and was not progressed.

A more serious case arose several years later. A Circuit Court Judge, Brian Curtin, was charged with possession of child pornography in 2002 but acquitted on a technicality in 2004 when it transpired that the key evidence against him – his personal computer – had been seized pursuant to an invalid search warrant. The result was that Curtin appeared to be guilty of a child sex offence but could not be convicted. The Oireachtas therefore began to put in place a process for impeaching him. As this had never been done before much of the process had to be created from scratch. A special joint committee of the Oireachtas was created for the purpose of examining the evidence against Curtin. Special legislation had to be enacted in order to give Oireachtas staff and Committee members immunity from prosecution in respect of handling the criminal material, and further legislation was required to compel Curtin to testify.[69] Curtin resisted and delayed the process as much as

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[65] Dáil Éireann Deb., vol 504, no. 2, 5 May 1999.

[66] *Report of the Constitutional Review Group,* April 1995. Available at http://archive.constitution.ie/constitutional-reviews/crg.asp [last accessed 15 September 2017].

[67] *See* BYRNE, *ET AL*, *supra* note 3, 188.

[68] BYRNE *ET AL*, *ibid*, 191.

[69] Amendment to § 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997.

he could. When the Committee ordered Curtin to produce the computer, he challenged the request in the High Court and then the Supreme Court. The Supreme Court rejected his arguments, holding that power to impeach a judge in Article 35 of the Constitution included a power to investigation his fitness for office.[70] Curtin then sought a further adjournment of the committee hearings on grounds of ill health. When this was not forthcoming he resigned from his position, having just served long enough in his post to qualify for his pension.

The Curtin case was the closest Ireland had come impeaching a judge, and the uncertain and improvised nature of the process only emphasized the potentially serious consequences of Ireland's lack of an infrastructure for judicial discipline.[71] Once again, there was general support amongst politicians and judges for reform along the lines proposed in the 2001 report.[72] A working group was established but progress on the matter remained extraordinarily slow.[73] Draft bills were prepared in 2009 and 2010 but never progressed. A process involving the Government and the interim Judicial Council began in 2013 but produced a Bill only in 2017. This coincided with an unflattering report from the GRECO organization of the Council of Europe criticizing the delay in legislating for a Judicial Council, which appears to have provided some impetus for finalizing the proposals.[74]

There is no single reason for the extraordinary delay in implementing a Judicial Council proposal that has been supported across the judiciary and politics for 17 years. As with judicial appointments, however, part of the explanation is that the politics are not favorable. Even uncontroversial reforms to judicial administration lack sufficient political salience to make it onto the legislative agenda. They are simply not interesting or important enough to politicians. Irish politics in the past decade has revolved around highly controversial fiscal measures related to the economic collapse and EU/IMF bail-out of the

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[70] *Curtin v. Clerk of Dáil Éireann* [2006] IESC 14, [2006] 2 IR 556.

[71] There have been other – fortunately isolated – incidents of misbehavior in recent years. Another judge, Heather Perrin, was convicted of deception in 2009 and resigned. At the trivial end of the spectrum, in 2011 an unidentified judge in a semi-naked and agitated state shouted and swore at a group of British tourists in a hotel who he felt were making too much noise, implicitly threatening them by mentioning that he had relatives who had fought in the old IRA against the British. The incident was reported to the courts but in the absence of formal disciplinary powers "[a]ll the senior judges could do was to sit down with the judge over a cup of tea and suggest that he take a rest." (MACCORMAIC, *supra* note 37, 382).

[72] Survey taken in 2007 by the Irish Council for Civil Liberties: *Justice Matters: Independence, Accountability and the Irish Judiciary* (2007), 72.

[73] BYRNE *ET AL*, *supra* note 3, 193.

[74] Conor Gallagher, *Report finds Ireland "unsatisfactory" in judicial independence*, The Irish Times, Jun. 29 2017. *See* GRECO (Group of States against Corruption), Fourth Evaluation Round*: Corruption prevention in respect of members of parliament, judges and prosecutors: Compliance Report: Ireland*, Jun. 292017.

country. Only very high profile political issues could get a hearing during the years of serious budgetary retrenchment. This situation may continue. A recent statement of Government legislative priorities refers to the Judicial Appointments Bill 2017 but not the Judicial Council Bill 2017.[75]

The political history of the Courts Service, judicial appointments and Judicial Council reforms appears to highlight the dependence of judicial reform in Ireland on politics and the political agenda. Where judicial reforms solve a problem for politicians they are willing to champion it. The Judicial Council reform, despite broad political support, has simply not been politically important enough to be enacted.

D. Judicial independence, politics and personality: the financial crisis in Ireland and a crisis of relations

I. The referendum on judicial salaries

Judicial independence in Ireland is robust. Notwithstanding the administrative limitations of judicial self-governance outlined above, and particularly the politicized nature of judicial appointments, there is no evidence of a party-political bias in the judgments of the Supreme Court.[76] Elgie *et al* speculate that in the Irish system judicial appointments are a reward for service prior to appointment rather than an expectation of future behavior. They also point to the unusual nature of Irish politics, which has historically exhibited deep partisan divisions but only minimal ideological differences between the major parties, as a reason why partisanship might have limited effect on judicial decision-making.[77] The strong culture of *de facto* judicial independence at the Irish bar is also important – especially given the absence of *de jure* accountability mechanisms. Judges, drawn from the legal professions in middle-age, will likely tend to share the cultural values of independence and objectivity of their peers who remain in practice, and given the relatively small size of the Irish legal profession will be anxious to maintain the esteem of colleagues on and off the bench. This could be a powerful control on the behavior of judges even after appointment.[78]

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[75] Government Legislation Programme Autumn Session 2017, 19 September 2017. *See* http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/ [last accessed 22 September 2017].

[76] *See* Robert Elgie *et al, The (not-so-surprising) non-partisanship of the Irish Supreme Court* 33 Irish Political Studies 88 (2017). On the independence and accountability of the Irish judiciary generally, *see* Tanya Ward, *Independence, Accountability and the Irish Judiciary* (2008) Judicial Studies Institute Journal 1.

[77] Elgie *et al*, *ibid*, 105

[78] *See* Elgie *et al*, *ibid*, and David Gwynn-Morgan, *Government and the Courts* in GOVERNING IRELAND (Eoin O'Malley & Muiris MacCarthaigh ed. 2011), 234.

There is thus a very positive story to tell about *de facto* judicial independence in Ireland. Nonetheless the absence of machinery to manage or discipline judges has (as discussed above) taken Ireland close to constitutional crisis twice in the last twenty years. The long-standing proposals for a Judicial Council were directed particularly at this significant gap in judicial accountability mechanisms: the Council is intended to give the judiciary the power to police itself. The Judicial Council is also intended to provide an important coordinating and representative function for the judiciary. The absence of such representation was keenly felt in connection with the crisis in relations between the Government and the judiciary that between played out against the background of the financial crisis that engulfed Ireland from 2007 onwards. For most of its history, relations between the judiciary and the Government have been safe and unremarkable. The judiciary have generally been of very high quality, have kept out of politics, have exercised quiet influence over the Government over matters that were important to them. This changed dramatically around 2010-11, however. As a result of a financial crisis and the EU/IMF led bailout of the Irish exchequer, the salaries and benefits of all state employees were significantly reduced. The judiciary were exempted from these measures because of Article 35.5 of the Constitution, which provided that:

> The remuneration of a judge shall not be reduced during his continuance in office.

The Attorney General advised the Government that this required judges to be exempt from the general cuts applied to other state employees.[79] This special treatment of judges in a financial crisis was never going to be politically palatable and so initially a workaround was created. A process was established allowing judges to voluntarily forego a portion of their salary in line with the cuts to salaries of other public servants. Uptake of this scheme was, perhaps not surprisingly, quite slow and a source of negative public comment.[80] (Although by January 2011 a significant majority – 111 out of 147 judges – had signed up to the scheme.[81]) The situation was not helped by the fact that Irish judges were amongst the highest paid in the world. Despite significant personal pressure from the Chief Justice and the senior judiciary, who feared the public and political reaction if judges were perceived to be refusing to make the same sacrifices as their fellow citizens, there remained a rump of judges who refused to engage with the voluntary scheme.

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[79] It is arguable that this advice was overly conservative. In *O'Byrne v. Minister of Finance* [1959] IR 1, the Supreme Court had held that art. 35.5 did not exempt judges from the requirement to pay taxes and other charges that applied to all citizens. A levy applied to all state salaries might arguably have withstood constitutional scrutiny on the basis that it was not specifically directed at judges but at all public-sector employees. *See* Patrick O'Brien, 'Judicial Independence and the Irish Referendum on Judicial Pay', UK Constitutional Law Blog, Sept. 16 2011, available at http://ukconstitutionallaw.org/ [last accessed Sept. 15 2017].

[80] *19 judges take voluntary pay cut*, *RTÉ News* Jun. 19 2009: https://www.rte.ie/news/2009/0619/118642-judges/ [last accessed Sept. 15 2017].

[81] *Voluntary levy paid by 111 judges*, The Irish Times Jan. 18 2010.

The new Government elected in February 2011 campaigned on a promise to change the Constitution in order to permit reductions to judges' pay. As all changes to the Irish Constitution must be approved by the people in a referendum, this would require a referendum. The new Justice Minister, Alan Shatter, had already tried to introduce a referendum bill while in opposition.[82] Now in Government, he pushed the referendum and wholesale reforms to the courts and the legal profession with what O'Dowd dryly describes as his characteristic 'tenacity, trenchancy and vigor'.[83] Shatter took no prisoners in politics. His brusque, tabloid-friendly style in selling his referendum proposal was nothing like the measured, respectful 'bedside manner' judges were used to. Many believed he was pursuing a vendetta against them.[84] His proposals for reform to the legal professions were openly loathed by the Bar too.[85] Significant resentment built up within the judiciary. Traditionally, Irish judges have observed a convention that they should not speak publicly on matters of political controversy. Conversations between judges and the Government about terms and conditions or the operation of the courts system were carried on firmly out of public view. The Attorney General would generally act as a postbox for letters and expressions of concern from the Chief Justice, as spokesperson for the judiciary, to the Government. For most of the history of the State this model had functioned well. Now, however, the mechanisms for communication within the judiciary and between the judiciary and the Government appeared to break down almost completely.[86]

A split developed within the judiciary between those who wished to continue this form of negotiation (including Chief Justice John Murray and his successor Susan Denham) and those (such as the Supreme Court judge Adrian Hardiman and the High Court judge Peter Kelly) who felt that quiet diplomacy had failed. This latter group wished to confront the Government and defend the position of the judges publicly. The way this split played out highlights the extent to which the Irish judiciary is *not* self-governing, and the way that individual judicial independence has hitherto over-shadowed corporate independence. In deciding a course of action, the divided judges of the Supreme Court could not agree whether to release a public statement. In the absence of unanimity, they could not even agree a process that would allow them to make the decision.[87] Ultimately a compromise was reached. In July 2011, a memorandum was sent to the Government through the

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[82] Twenty-Ninth Amendment to the Constitution Bill 2009.

[83] John O'Dowd, *Judges in whose cause? The Irish bench after the judges' pay referendum* 48 IRISH JURIST N.S. 102 (2012), 108.

[84] MACCORMAIC, *supra* note 37, 375.

[85] Legal Services Regulation Bill 2011.

[86] O'Dowd, *supra* note 5, 162.

[87] MACCORMAIC, *supra* note 37, 378.

Attorney General and subsequently released to the media through publication on the website of the Courts Service. The judges were at pains to point out in their Memorandum that they were not opposed to a pay cut as such, but expressed concerns about the wording of the referendum proposal itself, which they felt created a threat to judicial independence. They proposed instead that an independent body should be established to set judicial pay and conditions. Despite wanting for accuracy and proportion in places,[88] the content of the Memorandum largely reflected the overwhelming view of the legal profession.[89] The Memorandum was thus contestable, but relatively innocuous.

The judiciary could not, therefore, have anticipated the furious reaction of Shatter, who regarded the publication of the Memorandum on the website of the Courts Service as an unacceptable use of the resources of a state agency for political purposes.[90] He contacted the Chief Executive of the Courts Service to insist that it be removed. The incident revealed the fragility of the Courts Service's own independence. The Chief Executive was formally responsible only to the Board, with its judicial majority, but the political pressure from the Minister was considerable. The result was that, having been published on the Courts Service website at the request of the Chief Justice, the Memorandum was quickly removed at the insistent of the Minister for Justice. The Courts Service was revealed to be anything but a representative body for the judiciary. It subsequently emerged that the judiciary had sought – and been given – approval from the Attorney General to publish the Memorandum in this way but by that stage serious damage to relationships between the government and the judiciary had already been done.[91]

The referendum proposal passed by an overwhelming majority (nearly 80%) in October 2011. The new Article 35.5 replaced the prior absolute restriction on reductions to judiciary salary with a conditional protection that reads, in relevant part:

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[88] The suggestion that the proposed wording exposed Ireland to international reputational damage and possibly a case in the international courts was probably a rhetorical flourish too far: O'Dowd (2012), *supra* note 83, 122. The suggestion at the beginning of the Memorandum that judicial pay 'in these islands' had never been reduced since the Act of Settlement 1701 was woefully ignorant of legal history. Judicial pay for the UK (including Ireland) was significantly reduced in 1832 and judges took a pay cut of approximately 50% upon Irish independence in 1922: BYRNE *ET AL*, *supra* note 3, 205. There was also a cut to the salaries of judges in England and Wales in 1931 in circumstances that bear remarkable similarity to the Irish experience of 2011. *See* ROBERT STEVENS, JUDICIAL INDEPENDENCE: THE VIEW FROM THE LORD CHANCELLOR'S OFFICE (OUP, 1993), 50–63.

[89] Legal opinion on the merits of the amendment tended towards the view that it was vague and badly worded, given that it lacked definitions of 'classes of persons' or the 'public interest' test set out. E.g. Ronan Keane, *Judicial Independence: The best we can do?* 29 Irish Law Times 191 (2011) and the other contributions to that special volume of the Irish Law Times.

[90] Minister disappointed memo still on court website, *The Irish Times*, Jul. 11 2011.

[91] Michael Brennan, *AG gave judges go-ahead to publish memo on salary cuts*, The Irish Independent, Jul. 11 2011.

> Where, before or after the enactment of this section, reductions have been or are made or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.

Following the amendment, salary cuts and related pension levies that had previously been applied to other public servants were extended to the judiciary.

The referendum campaign prompted a crisis in relations between the Government and the judiciary. From the perspective of the judiciary, they had been made the victims of a power play by a Government anxious to show its 'political virility' to the public.[92] Privately judges lamented the impossible position they had been placed in, and many felt that the Government should simply have imposed the cuts under the old Article 35.5. 'No judge would have dared challenge that view in the current climate … This was the worst of all worlds.'[93] Because of their constitutional position the judges could say very little in public to defend their position. The little they attempted to say – through the Memorandum – was dismissed out of hand by the Government and removed from the website at the insistence of the Minister. The judges had no vehicle to express their views and, from the perspective of many, the presidential model of quiet relations had failed. The new Chief Justice, Susan Denham (appointed in July 2011) had a good working relationship with Shatter, but such was the personal *animus* many judges now had against Shatter, that this in itself became a source of criticism of the new Chief Justice from within the judiciary.[94]

II. Judicial Council(s): rival power bases within the judiciary

Following the referendum was the establishment two new judicial organizations were established at the national conference of the judiciary on 18 November 2011. The first was an 'interim Judicial Council', of which all judges would be members, created by the Chief Justice. This organization would perform functions in relation to judicial standards, ethics, education and representation and was explicitly created in anticipation of the long-awaited statutory Judicial Council. The second organization, the Association of Judges of Ireland (AJI), was created with the aim of giving judges a vehicle through which to speak on matters of importance.[95] This organization, led by Peter Kelly, a High Court judge and inaugural President, was successful in attracting membership from around 80% of the

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[92] Noel Whelan, *More to power than making the right noises*, The Irish Times, May 7 2011.

[93] Anonymous judge quoted in MacCormaic, *supra* note 37, 368.

[94] MacCormaic, *supra* note 37, 380.

[95] *See* the AJI's own explanation of its rationale at http://aji.ie/about-us/foundation/ [accessed Sept. 15 2017].

judiciary and initially acted as something akin to a trade union. The functions of the two organizations clearly overlapped, although the AJI describes itself as acting in support of the work of the interim Council.[96]

Trust between the Government and the judiciary was at its lowest point in 2013, following further changes to pension provision and the unrelated decision of the Government not to reappoint three serving Irish members of European courts to their posts. In a break with prior practice, these returning European judges were not offered equivalent domestic judicial posts; something many judges felt was worse than anything else the Government had done so far. Matters were brought to a head by private remarks made by Peter Kelly to a gathering of business leaders in which he spoke of a complete breakdown in relations between the Government and the judges, and declared that the Government was dismantling judicial independence in Ireland 'brick by brick'.[97] The remarks were leaked to the press and contemporaneous reports suggested that several judges were considering resignation. The AJI released a combative statement supporting Kelly and stating that '[a]ll structures, both formal and informal, which existed for communication between these two branches of government have ceased.'[98] The Minister, Alan Shatter, released a statement of his own in response, accusing Kelly of exaggerating the situation and creating a misleading impression of a threat to judicial independence from the Government.[99] Embarrassingly for Kelly and the AJI, Shatter was correct: they had indeed overstated matters. Relations between the two branches were hardly healthy, but – apparently unknown to Kelly – the Chief Justice, the Attorney General, and the Minister were still having private discussions in the traditional way. The creation of the AJI was a well-intentioned effort to channel some of the resentment of the activist faction of the judiciary and to institute clearer systems for communication with the Government and the public, but it had clearly backfired. The Association had not disrupted the traditional mechanisms for communication between the Government and the judiciary, but it had unintentionally created competing spheres of influence within the judiciary: the Chief Justice and the interim Judicial Council on the one side and the AJI on the other. The AJI appears to have been the response of the 'activist' faction of the judiciary, led by Kelly, Hardiman and the High Court President Nicholas Kearns amongst others, to the crisis of relations with the Government. But the 'diplomatic' faction of the judiciary, led by the Chief Justice, still apparently preferred the traditional *sub rosa* approach. The AJI was not simply a 'rank and file' movement. It counted some of the most senior judges in Ireland – although not the

[96] From the AJI's website, *ibid*.

[97] Dearbhail McDonald and Cormac McQuinn, *Shatter sparks major judicial crisis*, The Irish Independent, Apr. 16 2013.

[98] *Judges' group back Judge Kelly's comments about political interference in judiciary*, RTÉ News, Apr. 15 2013.

[99] *Alan Shatter criticizes High Court comments on pay*, The Journal, Apr. 15 2013 [http://www.thejournal.ie/alan-shatter-judicial-pay-8700890-Apr2013/ last accessed 15 September 2017]

Chief Justice – amongst its membership. Kelly's remarks revealed a lack of communication between the groups. Part of the job of the Chief Justice now became to mediate between the Government and the more activist wing of the judiciary represented by the AJI.[100]

The crisis was defused by a carefully choreographed speech by the Chief Justice which was the product of talks between Denham, Kelly and the top level of Government. Denham explained that contacts with the Minister and the wider Government had continued through the crisis and announced the creation of a new Working Group to repair relations with the Government. This group would include the Chief Justice, Kelly (as president of the AJI) and representatives from each level of the court system. The Government would be represented by the Attorney General and the Government Secretary General (the country's top civil servant). Tellingly, the Working Group excluded the Minister for Justice, Alan Shatter. Under the new arrangements, coordinated through the Working Group, both sides appeared anxious to sue for peace. The judiciary quickly conceded a business-friendly extension to court terms[101] and the Government held and won a referendum on the creation of a new Court of Appeal to sit between the High Court and Supreme Court (a long-held ambition of the Chief Justice). Referendums on low profile 'machinery of government' issues often create unforced political defeats for serving governments, so the fact that the Government was willing to hold the referendum at all indicates its commitment to fixing relations with the judges.[102]

The crisis and the way it was resolved serve to emphasize the importance of personality to the Irish system. One could conclude that the AJI owes its existence largely to a serious personality clash between Alan Shatter and the judiciary. Shatter's refusal to follow past practices for engaging with the judiciary gave some substance to their feelings of vulnerability during the economic crisis and eventually created a shadow of distrust over his every engagement with them. Judges had good reason to feel harshly treated by Shatter's high-handed approach, but in personalizing the matter they ignored the fact that the referendum had widespread support across Government and indeed widespread public support. They appear to have mistaken Shatter's aggressive political style for a genuine threat to their independence. On the available evidence such a threat was never in prospect. The politics of the 2011 referendum represented unfortunate own goals for both the Government and the judiciary, but it is only out of an abundance of caution on the Government's behalf that the referendum was held at all. Shatter departed from the Department of Justice in 2013 and his successors have been more emollient. In this calmer environment, the Working Group and the interim Judicial Council appear to have become the dominant vehicles for coordinating relations with the Government and within the

[100] O'Dowd (2017), *supra* note 5, 156.

[101] Ruadhán MacCormaic, *High Courts to extent sitting into summer holidays*, The Irish Times, Apr. 27 2013.

[102] O'Dowd (2017), *supra* note 5, 155.

judiciary, with the AJI fading into the background. Judges have been angered by the proposed changes to judicial appointments in the JAC Bill 2017, and some have made personal public statements, but the AJI has reticent. It has released only one statement in relation to the 2017 Bill, and finished that statement by commenting that 'Having regard to its reluctance to become involved in public controversy, other than issuing this statement, neither the AJI nor its officers will be commenting further.'[103] To a Dublin legal journalist in September 2017, it appeared that the AJI 'isn't relied on too much' and that the interim Judicial Council was now the primary vehicle for lobbying and negotiations with the Government.[104]

E. Conclusion

Judicial independence and judicial self-governance depend on the support of politicians and a culture of mutual respect. The example of Ireland demonstrates this clearly. Judicial independence in Ireland is robust despite a comparatively significant role for politicians in appointments and the absence of structures for discipline and management. Conversely, a culture that depended on good informal relationships was vulnerable to disruption when, during the financial crisis, resources were strained and strong personalities became dominant. The development of court administration and judicial self-government processes in Ireland suggests a similar conclusion. The dire state of court administration and court buildings prior to 1999 owed much to the fact that politicians were uninterested in the former and unwilling to take responsibility for the latter. Politicians were only too willing to hand responsibility for closing local courts over to an independent and apolitical judicial branch, and so to avoid having to account for such closures to local electorates. This potentially significant change to the balance of the separation of powers was therefore uncontroversial. By contrast politicians valued the potential for patronage involved in judicial appointments, and so have been less willing to relinquish control in that area. Reform to judicial discipline has yet to become politically urgent enough to justify the parliamentary time required to enact Judicial Council legislation. In protecting judicial independence and reforming judicial governance in Ireland, getting the politics right is key.

[103] *See* https://aji.ie/press-release-26-june-2017/ [last accessed Sept. 15 2017].

[104] Private correspondence with the author.

Articles

Contextual Analysis of Judicial Governance in Slovenia

*Matej Avbelj**

Abstract

What is a real character of judicial (self)-government in Slovenia? Does it live up to the standards established in a well-ordered society, based on the established rule of law and consolidated democracy? This certainly is an impression that an external critical, but uniformed, observer develops when he or she approaches the legal regulation of judicial (self)-government in Slovenia. This also is an impression that has been perpetuated in academic and professional circles prior and after the enlargement of the EU. The article dispels this myth. It does so by providing a comprehensive assessment of all the bodies and processes involved in the judicial (self)-government in Slovenia. Contrary to the prevalent formalistic legal approach, which dominates the legal scholarship concerned with judicial governance and the courts more generally, the article relies on a socio-legal methodological approach. It therefore situates the system of judicial self-government in the Slovenian socio-political context in order to provide an insight into how the judicial self-government really works and to what an extent it falls short of the normative ideals prescribed by the Slovenian positive law.

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A. Introduction

What is a real character of judicial (self)-government in Slovenia? Does it live up to the standards established in a well-ordered society, based on the established rule of law and consolidated democracy? This certainly is an impression that an external critical, but uniformed, observer develops when he or she approaches the legal regulation of judicial (self)-government in Slovenia. This also is an impression that has been perpetuated in academic and professional circles prior and after the enlargement of the EU. There Slovenia has always been regarded as a good disciple and, consequently, as a role model for all the transitional countries that inspire to become the members of the EU in the foreseeable future.

The article dispels this myth. It does so by providing a comprehensive assessment of all the bodies and processes involved in the judicial (self)-government in Slovenia. Contrary to the prevalent formalistic legal approach, which dominates the legal scholarship concerned with judicial governance and the courts more generally, the article relies on a socio-legal methodological approach. It therefore situates the system of judicial self-government in the Slovenian socio-political context in order to provide an insight into how the judicial self-government really works and to what an extent it falls short of the normative ideals prescribed by the Slovenian positive law.

The argument is developed in four parts. The first part on the forms and rationalities of judicial self-government provides an in-depth description of the historical evolution and present arrangement of the modalities of judicial self-government in Slovenia. It seeks to acquaint the reader with the factual background necessary to comprehend the ensuing critical reflection on the shortcomings of a hence established system of self-government in practice. These shortcomings are analysed and illustrated in part two and three. They are concerned with the impact of judicial self-government on the independence, accountability, legitimacy, transparency and confidence in the judiciary, as well as with the repercussions of judicial self-government for the principle of separation of powers and the democratic principle. The article concludes by pointing to a yawning gap between the judicial self-government on books and the way it is really conducted in practice. It demonstrates how the remnants of the communist totalitarian past and the dense formal and informal networks in a relatively small Slovenian legal and political community have been used to manipulate the legal system of judicial self-government so to detract rather than to contribute to the values and principles associated with judiciary in a well-functioning constitutional democracy.

B. Forms and Rationalities of Judicial Self-Government

The Republic of Slovenia obtained its independence from the Socialist Federal Republic of Yugoslavia in June 1991. The act of self-determination of the Slovenian people was not

motivated only by a desire to create an independent state. More importantly, this newly created state should have been of a fundamentally different quality than the one the Slovenian people decided to leave on a referendum in December 1990. Yugoslavia was neither based on the rule of law nor were the fundamental human rights and the national rights of the republics and autonomous provinces respected.[1] The object and purpose of the Slovenian independence was thus a discontinuity with a totalitarian communist regime[2] and its replacement by a polity committed to the values of constitutional democracy.[3] This qualitative change ought to be reflected also in the institutional structure of the newly independent state. The form should have been brought in compliance with the substance.[4]

On a general level, this has indeed been the case. Most importantly, the system of separation of powers (checks and balances) was created in lieu of the system of undivided powers existing under the totalitarian communist regime.[5] This has, *inter alia*, introduced structural changes in the formal functioning of judiciary in Slovenia. The courts have become an independent, third branch of power. They were entrusted with a duty of ensuring judicial protection in fair trials conducted following due process of law, without undue delay, by independent and impartial courts constituted by law and composed of lawful judges.[6] This was a normative requirement stemming from the newly adopted Constitution. Its fulfilment required a drastic change in the governance of the Slovenian judicial branch. The previously politically dependent judiciary, headed by the President of the Supreme Court who was simultaneously a functionary of the Communist party, had to be brought in compliance with the new constitutional order.

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[1] Basic Constitutional Charter OJ RS, No. 1I/1991.

[2] Constitutional Court Decision U-I-69/92 of 10 December 1992, para. 8 noting that Slovenia in Yugoslavia was a state "whose authorities had after the end of the war carried out mass executions of former military and current political opponents, legally unacceptable trials followed by death penalties, illegal seizure of property, obstruction and liquidation of political parties in violation of its own legal system etc., thus making the injured parties afraid, with good reason, for their lives in case of residing in such a country."

[3] Constitutional Court Decision U-I-109/10 of 3 October 2011, para. 18.

[4] For a good analysis that this normative objective continues to remain only partly realized, *see* Jan Zobec & Jernej Letnar Černič, *The Remains of the Authoritarian Mentality within the Slovene Judiciary, in* CENTRAL EUROPEAN JUDGES UNDER THE EUROPEAN INFLUENCE: THE TRANSFORMATIVE POWER OF THE EU REVISITED (Michal Bobek ed., Hart, 2015); *see* also Matej Avbelj, *Crises and Perspectives in Building a European Nation – The Case of Slovenia, in* NATION'S TRANSITIONS: SOCIAL AND LEGAL ISSUES OF SLOVENIA'S TRANSITIONS: 1945-2015 (SLOVENIA 1945-2015) (Peter Jambrek ed., 2014).

[5] Constitution, Art. 3.

[6] Constitution, Art 23.

The introduction of judicial self-government in Slovenia was initially motivated purely by domestic reasons, to effectuate a qualitative transition to a constitutional democracy. However, the latter was also instrumental to obtaining membership in the Council of Europe and later in the European Union. The external incentives theory for developing judicial self-government therefore, at least in part, also provides an explanation for the Slovenian case.[7] Finally, as the ensuing discussion will demonstrate, the way the judicial self-government in Slovenia *de facto* works also fits well the judicial leadership theory.[8]

The judicial (self)-government in Slovenia is exercised through a complex web of checks and balances. This is constituted of a triangle of the three branches of power: the judicial, the executive and the legislative branch, alongside with a sui-generis institution: the Judicial Council. The latter is the main body of judicial self-government *stricto sensu*. The judicial self-government *lato sensu* is thus divided between the Judicial Council and the Judicial Administration that is carried out by the courts themselves and, in particular, by the presidents of the courts, who are sometimes assisted by the court's Director,[9] in co-operation with the Personnel Councils. The managerial and administrative position of the presidents of the courts is very strong. They are responsible for an overall sound management of their respective courts. They make preliminary selection of individuals to be appointed as judges by the National Assembly upon the proposal by the Judicial Council. Moreover, the presidents of the courts are also chairing the Personnel Councils. The latter are organs composed of several influential judges who exercise peer-review and rate their colleagues' work to, finally, make recommendations to the Judicial Council as to the career development of individual judges.

The Ministry of Justice carries political responsibility for the functioning of the judiciary. It must ensure a sufficient judicial budget and it drafts the legislative and adopts the administrative framework for the functioning of the judiciary. More recently, the Ministry has also started exercising an administrative oversight of the judiciary through the Office for the Supervision of Court Management.[10] Finally, the National Assembly adopts the legislative framework, decides on the courts' budget and, most importantly, appoints all the judges. It also elects the President of the Supreme Court who is the head of Judicial Administration of Slovenia and represents the judiciary in public as well as in relationship with the other two branches of power. The following figure sketches the main bodies of judicial (self)-government in Slovenia. They and their competences will be described in more detail below.

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[7] *See*, for example, Petra Guasti, Bojan Dobovšek & Branko Ažman, *Deficiencies in the Rule of Law in Slovenia in the Context of Central and Eastern Europe,* 14 VARSTVOSLOVJE 175–190 (2012).

[8] DAVID KOSAR, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016).

[9] Courts Act, Art. 61, 61b.

[10] Courts Act, Art. 65.

Figure 1: Judicial (Self)-Government in Slovenia

In the anticipation of the qualitative change of the regime, the Judicial Council [*Sodni svet*] was established already in 1990, before the independence and while the democratic transition only started taking shape.[11] It was composed of nine members: five judges, three lawyers of high reputation and the then minister of justice. All of them, other than the minister who was a member *ex lege*, were appointed by the socialist National Assembly [*Skupščina*]. The role of the hence established Judicial Council was very limited, if not even negligible. It was consulted on the issues relating to the management of the courts' personnel.[12] However, despite its circumscribed role, the Judicial Council was a harbinger of the model of judicial self-government to be established with the adoption of the new Constitution [*Ustava*] in December 1991.

[11] ZVONKO FIŠER, SODNI ALI PRAVOSODNI SVET, V NORMATIVNE SPREMEMBE NA PODROČJU SODSTVA V REPUBLIKI SLOVENIJI (2001).

[12] *Id.*

The Constitution, and on its basis two systemic laws regulating the judiciary: The Courts Act [*Zakon o sodiščih*][13] and The Judicial Service Act [*Zakon o sodniški službi*],[14] established the judiciary as an independent branch of power, in principle fully in compliance with the then and now existing comparative constitutional and international standards for the functioning of the judiciary. This new, modern and up to date constitutional status of judiciary, which was also adopted with an eye on the desired accession of Slovenia to the Council of Europe and the European Union, enjoyed a unanimous support of the political parties and the legal expert community. Similarly, there has always been a consensus that the independent functioning of the judiciary requires the existence of a special sui generis body, which would ensure that the judiciary complies with the constitutional requirements and that the two other branches of power do not interfere with it. However, views were split on the precise nature, composition and competences of such a body.

Some legal experts argued in favour of a justice council broadly conceived of. This would regulate not just the status of judges, but also of other actors in the justice system, in particular the status of the prosecutors. This view remained in a minority and eventually a judicial council competent exclusively for judges was established. As this issue had been resolved, the decision had to be taken whether the judges should be in the majority in the hence established council or, alternatively, should their powers and the potential for judicial corporatism be counterbalanced and offset by other legal professionals, most notably academics and the representatives of lawyers in private practice. Politically this debate has never really been settled. The post-communist centre-right political parties, in particular, continue to insist that the judicial majority in the Judicial Council is too often used as a self-serving measure by the judges. Also the former Constitutional Court Justice Matevž Krivic has repeatedly argued that the majority of judges in the Judicial Council should be replaced by the majority of those nominated by the National Assembly, also to ensure a more democratic control over the judiciary.[15] However, the Constitution legally pre-empted this debate at a very early stage.

Art. 131 of the Constitution, which has established a Judicial Council, stipulates that the latter is composed of eleven members, among which six are elected by the judges and five of them by the parliament: the National Assembly [*Državni zbor*] upon the proposal by the President of the Republic. The Slovenian Judicial Council is, as the Constitutional Court has also confirmed, a sui generis body, independent of the legislative and the executive branch and it does not represent the judges either.[16] The Constitution endows the Judicial Council

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[13] OJ RS 94/07.

[14] OJ RS 94/07.

[15] Matevž Krivic, *Drugačno mnenje o volitvah sodnikov,* 37-38 PRAVNA PRAKSA 12-13 (2002).

[16] Constitutional Court of Slovenia Case U-I-224/96, par. 11: "The Council of the Judiciary is thus an organ which performs a specific role in constituting judicial power and according to the valid statutory arrangement, generally decides on questions which affect the legal position of judges. From the point of view of the organisation of state

with only two, albeit important competences. The judge can be appointed or dismissed, in case of a serious violation of judicial duties, only upon the proposal of the Judicial Council.[17] This constitutional solution enjoys an unequivocal political and expert support in Slovenia. However, this is certainly not the case with regard to the constitutional actor, which disposes with the proposals of the Judicial Council.

It is a Slovenian particularity that the judges are appointed and dismissed by the National Assembly. As this carries a risk of politicization of the judiciary, that the framers of the Constitution were, of course, aware of, it needs to be explained why they opted for this solution. There are two main reasons for it and while they are both connected to the legacy of the preceding communist regime, they are in fact mutually contradicting. The appointment of judges by the National Assembly is a relic of the system of undivided powers, existing under communism. This was appealing to the Slovenian political left, which has evolved from the former communist party and has never entirely parted with symbolical as well as some organizational features of the preceding communist regime. At the same time, the centre-right post-communist parties also endorsed this solution. On the one hand, they did so because this solution strengthened the sovereignty of the people represented in the National Assembly, which was in line with the then post-independence referendum democratic euphoria of "we the people." However, a more important reason for not conferring the competences of appointment and dismissal of judges on the president of the republic, as is the case in most parliamentary systems, was a huge distrust of the presidential powers which were to be wielded by the last chief of the Communist party, Milan Kučan, who was elected as a President of the independent Slovenia. Political *ad personam* considerations thus led to a specific Slovenian system of appointment and dismissal of judges by the National Assembly which has, as will be discussed in more detail below, in part two, recently proven to be quite problematic.

With few exceptions,[18] the system of appointment of judges by the parliament has been criticized by the legal academia.[19] Under the impact of this criticism, in 2001 the then government proposed an amendment to the Constitution which would, now when the Office of the President was no longer occupied by the former chief of the Communist party, transfer the competences of appointment and dismissal of judges from the National Assembly to the President of the Republic. However, the amendment has never been

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power, the Council of the Judiciary is a special organ (state organ sui generis) which cannot be classified into any of the three branches of power." Such is also a self-description by the Judicial Council…

[17] Constitution, Art. 130, 132.

[18] Jernej Letnar Černič, *Kako izvoliti sodnike,* Ius Kolumna (Aug. 19, 2016); Tone Jerovšek, *Ustavna ureditev sodstva,* VII. Dnevi javnega prava, No. 1/2001, p. 47-59.

[19] Marko Novak, *Nevarno razmerje: politika nad Sodnim svetom,* Ius kolumna (Oct. 24, 2016); also Marko Novak, *Volitve sodnikov – mora Slovenija ostati evropska izjema?,* Ius kolumna (Aug. 29, 2016).

adopted. As with other relicts of the system of undivided powers, which entrust a lot more powers to the National Assembly than this is the case in the classical parliamentary systems, it became clear that it would be extremely hard, perhaps impossible, to convince the National Assembly to divest itself of any powers that it presently has, no matter how disruptive for a sound functioning of the Slovenian constitutional system they are.[20]

The limited scope of powers conferred on the Judicial Council by the Constitution has been significantly extended by the legislation. In 2017 a Judicial Council Act [*Zakon o sodnem svetu*][21] was adopted, so that the organization, financing, competences and procedures of this special body are now regulated in its own statute. This distinguishes between four main groups of competences of the Judicial Council. The first scope of competences pertains to the selection, appointment and dismissal of judges, presidents and vice-presidents of the courts.[22] The second concerns other issues of staff policy.[23] The third group of competences provides for the Judicial Council's role in the disciplinary procedures. The fourth group authorizes the Judicial Council to execute other tasks.[24]

As part of the first group of competences, the Judicial Council is authorized to deliver a preliminary opinion in the process of appointment of the president of the Supreme Court;[25] to propose the candidates for the position of the Supreme Court Judge to the National Assembly; to appoint and to dismiss the presidents and vice-presidents of all courts, other than the Supreme Court; to select the candidates for a vacant judicial post; to propose the candidates for the appointment as a judge to the National Assembly; to appoint an already elected judge to the advertised judicial post; to prepare a reasoned opinion in the process of dismissal of the president of the Supreme Court; to notify the National Assembly about a final conviction of a judge; to propose to the National Assembly a dismissal of a judge; to issue a declaratory decision on the termination of the judicial function.

With regard to the second group of competences pertaining to other staff-policy issues the Judicial Council decides on the incompatibility of the judicial function; on the question of promotion to a higher judicial title, to a higher salary class, to a position of a judge councillor, to a higher judicial position or on the extraordinary promotion. The Judicial

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[20] Matej Avbelj, *Sistem demokratične neodgovornosti,* Ius kolumna (Apr. 22, 2016).

[21] OJ RS 23/17.

[22] Judicial Council Act, Art. 23/1.

[23] *Id.*, Art. 23/2.

[24] *Id.*, Art. 23/4.

[25] The president of the Supreme Court is appointed by the National Assembly upon the proposal of the Minister of Justice.

Council also approves the negative evaluation of a judge and decides on the complaints of judges regarding their status' issues. It also decides on the relocation of a judge, as well as on other staff related issues determined by the law.[26]

The Judicial Council further nominates the disciplinary organs, initiates the disciplinary procedure and executes the disciplinary sanctions as part of its disciplinary competences.[27] Prior to the adoption of the Judicial Council Act the disciplinary procedures were carried out by the judiciary itself through its special disciplinary bodies. Between 2010 and 2016 there were 22 disciplinary proceedings initiated and they reached the following outcome:[28]

Table 1: The Supreme Court 2016 Annual Report.

	2010	2011	2012	2013	2014	2015	2016
Number of cases	0	7	1	1	3	7	3
Acquittal	0	2	1	0	0	3	1
Dropping of the case (judge left the office)	0	0	0	0	2	0	0
Transfer of a judge	0	0	0	0	1	0	0
Written warning	0	3	0	1	0	0	1
Salary decrease	0	0	0	0	0	2	0
Suspension of promotions	0	2	0	0	0	2	1

Among the so-called other competences, the Judicial Council, after having consulted the Minister of Justice, adopts the criteria for the selection of judges, as well as the criteria for evaluating the quality of judge's work. The Judicial Council also adopts the ethical code for judges and appoints the members of the Commission for ethics and integrity. Finally, the Judicial Council needs to be consulted in the matters of organizational scheme of the courts, in determining the number of judicial positions in a court, as well as in the process of adoption of the laws regulating the courts and judicial service. The Judicial Council also provides its opinion on the annual report of judicial activities prepared by the Supreme Court. It can require a review of management of a particular case, as well as it gives its opinion in case of detention or initiation of a criminal procedure against a judge. Last but

[26] Art. 23.

[27] Art. 23/3.

[28] The Supreme Court 2016 Annual Report, figure 56, at 103, http://www.sodisce.si/mma_bin.php?static_id=2017051514342635.

not least, the Judicial Council Act has newly authorized the Judicial Council to initiate a constitutional review before the Constitutional Court with regard to the regulations impinging on the constitutional status and role of the judiciary.[29] Upon the request of the Minister of Justice or the President of the Supreme Court, the Judicial Council also prepares a report on the matters falling within the scope of its competences and subject to public interest.[30]

It follows from the statutory regulation of the Judicial Council that its scope of competences is broad. They relate to almost all dimensions of judicial activity. However, this *de jure* relatively strong position of the Judicial Council is not necessarily a sign of its actual powers in practice. To the contrary, the Judicial Council as an institution has been very weak, since its formal powers have never been matched by an internal organizational structure that would enable its efficient functioning in practice.[31] The membership in the Judicial Council is only honorary. The new Act on the Judicial Council, despite the praise it has received in the expert community,[32] has left this intact. Other than a tiny secretariat, no one else conducts her role in the Judicial Council professionally, not even its president. In practice, this means that the sessions of the Judicial Council take place in the afternoon, or during the breaks, when its members are on leave from their quotidian occupations, and they devote a little bit of their extra time to the constitutionally mandated overall management of the Slovenian judiciary.

Of course, realistically this cannot be done. It would be impossible to execute all these important competences as a part time job, let alone as an honorary appointment. But since these competences need to be, and indeed are, executed in practice, this means that the centre of decision-making, the *de facto* source of the decisions formally taken by the Judicial Council must be elsewhere. It must be sought at a preparatory level, e.g. on the level of organs that prepare the files and draft the decisions for the adoption by the Judicial Council. These organs are the Personnel Councils [*personalni svet*] established at the District Courts, the Courts of Appeals and at the Supreme Court.[33] The Personnel Council is composed of a president of the court and six[34] or four judges,[35] who are elected

[29] Art. 23/4.

[30] Art. 24.

[31] Marko Novak, *Institucionalna podhranjenost slovenskega sodnega sveta,* 23 PRAVNA PRAKSA 17 (2013).

[32] Marko Novak, *ZSSve,* Ius kolumna (May 15, 2017); for a critique, *see* Matej Avbelj, *Legalistična naivnost,* Ius kolumna (July 17, 2017).

[33] Courts Act, Art. 30.

[34] District Court Personnel Council.

[35] Court of Appeals and the Supreme Court Personnel Council.

by the judges themselves.[36] Its role is to evaluate the quality of judicial service of the judges at the inferior courts and rule on their complaints against the evaluations hence prepared.[37] The judicial ratings prepared by the Personnel Council are an example of a judicial peer-review, which influences the judges' chances of promotion and hence determines the prospects for his or her entire career. While formally the Personnel Councils can make no binding decision on judge's promotion and career development, since these decisions belong to the Judicial Council, in practice the Personnel Councils, and presidents of the courts as their chairs, are extremely influential. In many ways, it is them rather than the Judicial Council, who take the decision. The best evidence produced so far can be found in a letter of resignation by a former member of the Judicial Council.

In 2003, Ms Nevenka Šorli, an attorney at law, resigned from the Judicial Council protesting that the latter is merely a rubber-stamping institution: "in practice the decisions on the promotion of judges are mostly already made by the personnel councils. There, however, it is more than apparent that the decisions are shaped by the principles of solidarity between judges and not to disappoint one's colleague."[38] The decisions on the (re-)appointment of the court's (vice)-presidents were, according to her, adopted in a similar way: "It is already an old practice that it is clear in advance that an incumbent (vice)-president of a court, if he or she decides to run again, will be reappointed, irrespectively of the actual results achieved under his or her presidency. This causes that other judges, probably again out of solidarity and tactfulness, do not decide to apply, but if they do, they are, as a rule, unsuccessful."[39] The system of judicial self-government is thus de facto bent in favour of the Personnel Councils, composed of influential judges, among which the courts' presidents play the most important role.

As convincingly argued by Vavken,[40] the too frequent and often unnecessary reforms of the legislation regulating the judiciary in Slovenia have incrementally strengthened the *de facto* already preeminent role of the presidents of the courts. It is not unusual for a president of the court, including a President of the Supreme Court, to simultaneously sit on and chair the Judicial Council.[41] In this way, the court presidents strengthen their formal as well as informal influence even further by being in charge of the judicial administration of

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[36] Courts Act, Art. 32, 33.

[37] *Id.*

[38] Nevenka Šorli, *Odstopna izjava članice Sodnega Sveta,* 20 ODVETNIK 31 (2003).

[39] *Id.*

[40] Luka Vavken, *Delovanje in upravljanje sistema rednega sodstva* (Master Thesis, University of Ljubljana Faculty of Law, 2016).

[41] This was the case of Mr Masleša prior to and some time after his appointment as a President of the Supreme Court.

an individual court, by exercising control over a selected Personnel Council and ultimately by taking part in or even running the Judicial Council. In so doing, a centralized, hierarchical structure of judicial governance has been created, on the basis of which the courts and individual judges are tightly managed and closely controlled by a leading structure composed of the presidents of the courts, chairs of sections, departments and their deputies.[42]

Most importantly, the presidents of the courts play a very strong role in the appointment of judges. They prepare a preliminary reasoned selection of the best candidates for an advertised judicial position and submit the list for the nomination to the Judicial Council.[43] The presidents of the courts can thus *de facto* filter who enters the judiciary. They also decide on the promotion of a judge in salary class[44] and play a leading role in the evaluation of a judge by the Personnel Council. The evaluation is conducted every third year, other than for the judges beginners who are evaluated on an annual basis in the first three years of their service. Despite the fact that the presidents of the courts have only one vote in the Personnel Councils, the latter are, in effect, run by the presidents of the courts. This is due to their official authority and because of the informal influence they wield in a 'bureaucratic' judicial structure, characterized by a collectivist judiciary as opposed to the one which is a sum of personally independent judges.

The system of judicial self-government thus *de jure*, but especially *de facto*, strengthens the leading judicial cadre, in particular the presidents of the courts. Not just external observers, but also Supreme Court justices themselves have therefore warned against the emerging judicial oligarchy, which exposes the Slovenian judiciary to notable risks of judicial corporatism. Moreover, the hence established strict hierarchy of judicial organization is closely modelled on the organization of public administration. The Supreme Court under the leadership of its President executes a plethora of tasks related to judicial administration[45] that are in other countries either in the hands of the executive branch or exercised by the judicial councils.[46]

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[42] *Id.*, at 67.

[43] Court Service Act, Art. 16.

[44] Court Service Act, Art. 28.

[45] Courts Act, Art. 60 stipulates that Judicial Administration, that the courts' presidents are responsible for, consists of: decision-making, knowledge-managament, planning, organization, staff-managament, leading, coordination, communication, monitoring the effects, reporting, managing the court's budget as well as all other tasks prescribed by the law. Moreover, according to Art. 60a it is also part of judicial administration to monitor, determine and analyze the efficiency of judges' work at the individual courts.

[46] Some Supreme Court justices themselves have been critical of the present system, *see* Mateja Končina Peternel, *Kakšne pristojnosti (naj) ima Sodni svet?,* 7-8 PRAVNA PRAKSA 6-7 (2015).

The judicial service is thus increasingly permeated by the administrative mind-set on whose basis the entire judiciary, more and more, functions as an administrative branch too.[47] This is reflected in the subjugation of judges to their hierarchical superiors who exercise a close administrative and formal control especially over the quantity, rather than quality, of the work done by individual judges. This bureaucratic mentality, which goes against the grain of a personal independence of an individual judge, has been so widespread that it has recently even found its expression in the EU-funded project run by the Supreme Court. The project, which carries an indicative title: "Let's judge together", implements a mentoring program for the newly appointed judges by the superior judges so to ensure that the newcomers will get quickly accustomed to the modalities of the system. This pressure to socialize every single individual judge under the overall expectations of the judicial system, as determined by the ruling judicial cadre, builds on a model of judiciary characteristic for socialism and its system of undivided powers.[48] The absence of a professionally run judicial academy, which is compensated for by a rather fragmented and ineffective continuing judicial education under the auspices of the Ministry of Justice, contributes further to this effect. All in all, the above-described developments have produced a tense climate of constant pressure,[49] which has since had a negative impact on the independence, accountability, legitimacy, transparency and public confidence in the judiciary.

C. The Impact of Judicial Self-Government on the Independence, Accountability, Legitimacy, Transparency of and Confidence in the Judiciary

Judicial independence is a paramount constitutional value related to the status, role and functioning of the Slovenian judiciary. There is a widespread agreement in Slovenia that in purely legal terms the judicial independence enjoy a sufficient degree of structural protection. However, from the very beginning the National Assembly's right to appoint judges has been critiqued as being incompatible with judicial independence or posing a threat to it. Until recently, this claim has not been supported by practical evidence, as the National Assembly has exercised its power of appointment more as a notary duty,[50] by almost automatically, without any substantive discussion, confirming the candidates proposed by the Judicial Council.[51] Yet, in 2015 the National Assembly unanimously refused the proposal of the Judicial Council to appoint a practicing attorney at law as a

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[47] Vavken, *supra* note 40, at 67; Marko Šorli, *Dialog za zaupanje in spoštovanje,* 24-25 PRAVNA PRAKSA 6-7 (2008).

[48] Matej Avbelj, *Zakaj ne sodimo skupaj?,* Finance (Nov 25, 2017), https://www.finance.si/8862512.

[49] Vavken, *supra* note 40, at 67; Marko Šorli, *Dialog za zaupanje in spoštovanje,* 24-25 PRAVNA PRAKSA 6-7 (2008).

[50] Vavken, *supra* note 40, at 101.

[51] Tone Jerovšek, *Ustavna ureditev sodstva,* VII. Dnevi javnega prava, št. 1/2001, p. 53, who reports that in the first ten years of the Slovenian independence the National Assembly refused to appoint three candidates, which were eventually nevertheless appointed upon the repeated proposal by the Judicial Council.

Court of appeals judge. Later in 2015, it also refused by an ordinary majority to elect an acting court of appeals judge to the Supreme Court.

The Judicial Council argued that this was a violation of the independence of judiciary as well as of the rule of law. In order to prevent the ongoing politicization of the judiciary it called for the amendment of the Constitution and the applicable laws to strip the National Assembly of its present powers.[52] The expert community and the general public at large remained divided about the conduct of the National Assembly. Some viewed it as an exercise of checks and balances,[53] while others claimed that this was indeed an interference with the independence of the judicial branch.[54] A similar division exists about the recently introduced Office for the Supervision of the Management of the Court [*Služba za nadzor organizacije poslovanja sodišč*].[55] Established within the Ministry of Justice and headed by a judge specifically designated to this post by the Judicial Council,[56] it is authorized to review the administrative management of the courts ensuring that the quality standards prescribed by the law are met.[57] The judiciary and several legal experts have been very critical of this measure. They insisted that as the line between the administrative and substantive supervision can be easily blurred, the Office for the Supervision violates the independence of the judiciary and is hence even unconstitutional.[58] The Ministry, on the other hand, has argued that the measure is both appropriate and necessary to address the administrative ineffectiveness of the courts. As such it has been defended as being part of the executive branch's responsibility to ensure efficient and high quality functioning of the courts.

Other than by the existing constitutional and legislative framework, the de jure judicial independence has also been strengthened by the jurisprudence of the Constitutional Court. The Court has thus declared unconstitutional a proposed salary reform which could, by introducing a stimulus for more productive judges, reduce the salaries of other judges or put them in an unequal position with other branches of power in terms of their remuneration.[59] In this way, the Constitutional Court has striven to ensure that the

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[52] http://www.sodni-svet.si/2016/tiskovno-sporocilo-izjava-za-javnost-sodnega-sveta-z-dne-25-11-2016/.

[53] Jasna Murgel, *Nedopusten poseg v sodstvo? Strah je odveč!,* 16 PRAVNA PRAKSA 12-13 (2015).

[54] *See,* for example, Matevž Krivic, *Se poslanci res imajo sposobne sodniškega odločanja?,* 7-8 PRAVNA PRAKSA 20-21 (2015).

[55] http://www.mp.gov.si/si/delovna_podrocja/sluzba_za_nadzor_organizacije_poslovanja_sodisc/.

[56] This position is currently held by a designated judge Miran Jazbinšek.

[57] Courts Act, Art. 65a.

[58] Vavken, *supra* note 40, at 81.

[59] Constitutional Court U-I-60/06; U-I-159/08. For a comment, *see*, Gregor Virant, *Sodstvo – močna veja oblasti in hkrati učinkovit servis,* 3 PRAVNA PRAKSA 6-7 (2007).

economic independence of judges is also safeguarded. The government moved to implement the ruling of the Constitutional Court, but the judges, under the leadership of the Association of Judges [*Sodniško društvo*], turned the salary offer down and went on strike for several months in 2008 and 2009. The Judicial Council refused to support the strike and therefore came under a judicial critique. On the other hand, the Association of Judges was seen by many as a "*judges' trade union* […] *the bulk of its activity being linked to salary bargaining*."[60] The controversy was ultimately resolved in favour of judges.

If the model of judicial self-government has created fairly little controversies with regard the *de jure* independence of Slovenian judiciary, the same cannot be said about the *de facto* independence and the outcome independence. From the outset, the objections have been made against the Slovenian judiciary that it lacks a *de facto* political independence. This claim has been substantiated by the absence of lustration.[61] While the Slovenian legislation provided for a limited lustration clause, on whose basis the judges who actively violated human rights in the previous regime could not be reappointed in the independent Slovenia, the clause essentially remained ineffective. Consequently, basically all judges from the communist regime, who so willed and desired, were appointed, without much actual scrutiny, to permanent judicial posts in the independent Slovenia. This outcome could be also, at least to a certain extent, contributed to the judicial self-government existing at the time, which, in the spirit of collegiality, ensured that the lists of judges, rather than individual names, would be voted on in the National Assembly.

As colourfully explained by one of the former presidents of the Judicial Council, the latter at the time acted as judge-making factory, which was *en masse* turning the previously socialist judges with a limited tenure into democratic judges with a permanent tenure.[62] Combined with the fact, that the Slovenian justice system failed to prevent or at least sanction the economic criminal activities which in the process of transition imposed huge costs on the previous social property and now on the tax-payers, and given that the most prominent actors in the crony capitalist transition were the members of the former communist elite, a wide spread sentiment has grown in the population, fuelled by the centre-right post-communist political parties, that the judiciary is under the influence of the former communist nomenclature, indeed its part and in service of its interests. This

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[60] CRISTINA DALLARA, DEMOCRACY AND JUDICIAL REFORMS IN SOUTH-EAST EUROPE (2014) 39.

[61] *See* further Zobec and Letnar, *supra* note 4, who point out that the entire body of lawyers was implicated in the previous regime and quote the following fitting paragraph by France Bučar: "with their often unnecessary or at least excessive meekness [...] they themselves have strengthened the totalitarian system, as by their conduct and laxness they were giving it justification of at least acceptability, if not legitimacy, and thus inadvertently confirming that it is right and simultaneously giving it an absolution for its violations of fundamental human rights." France Bučar, *'Pravnik v današnjem času' (uvodno predavanje na 30. Dnevih slovenskih pravnikov) [Lawyer in the Current Times, The Introductory Lecture at 30th Days of Slovene Lawyers],* 36 PRAVNA PRAKSA 6 (2004).

[62] Alenka Leskovic, *Deset let pozneje,* 18 PRAVNA PRAKSA 33 (1999).

sentiment has been accentuated further by the fact that the country has been for most of the time since its independence ruled by the centre-left political parties which have been, either directly or indirectly, descendants of the former communist elite.[63] This has prompted the beliefs that Slovenia is a captured, perhaps even a (post)-communist mafia state. The judges themselves have ignited these beliefs. Thus, for example, the President of the District Court of Ljubljana took part in a concert dressed up as a Tito's pioneer, wearing a red communist star and waving with a Yugoslav communist flag. The Judicial Council's reaction to her behaviour was extremely lukewarm, issuing no more than a public warning that judges should protect their independence, while her colleagues rushed to defend her right to use her free time and privacy as she finds it fit.[64]

However, it has been the appointment of Mr Branko Masleša in 2010 as a president of the Supreme Court, that has, besides the already mention judicial strike related to the salary dispute and the notorious Patria case,[65] had the most negative impact on the overall integrity of the Slovenian judiciary, both in objective and subjective (i.e. perceived) terms. Mr Masleša was a highly controversial political and legal figure. The centre-right post-communist parties claimed that before the independence he was, as a local communist functionary and a criminal judge in Koper, an avid supporter of the Yugoslav Army and a critic of the independence movement. He also took part in a trial that rendered the last death-sentence verdict in the Socialist Republic of Slovenia. Also, public charges were made against him that during the communist regime he participated at verifications of killings of renegades on the Yugoslav - Italian border.[66] For these reasons, Mr Masleša faced considerable hurdles in the process of his appointment to the Supreme Court in 2000. The National Assembly refused his candidacy and appointed him only after his candidacy was resubmitted by the Judicial Council. The then president of the Judicial Council, Marko Pavliha, wrote a highly emotional and critical letter in defence of Mr. Masleša, praising him as an extraordinary expert in criminal law with more than 20 years of experience.[67] A few years later, Mr Masleša became a president of the Judicial Council and in 2010, while still presiding over the Judicial Council, he was appointed as a President of the Supreme Court. Before his appointment, the public charges from 2000 were stressed again and were this time even corroborated by the Constitutional Court Justice and two Supreme Court judges. However, the Judicial Council, then chaired by the later Prime

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[63] FRANE ADAM & MATEVŽ TOMŠIČ, TRANSITION ELITES: CATALYSTS OF SOCIAL INNOVATION OR RENT SEEKERS?, (2000); Bojan Bugarič, *Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-between" Democracy and Authoritarianism*, 13 INT'L. J. OF CST. L. 229 (2015).

[64] Špelca Mežnar, *Zasebno življenje sodnice,* 20 PRAVNA PRAKSA (2014).

[65] *See* the discussion infra; for a broader overview, however, *see* Matej Avbelj, *Failed Democracy: The Slovenian Patria Case – (Non)Law in Context.* Available at SSRN: https://ssrn.com/abstract=2462613 (July 4, 2014). Originally published in Slovenian as Matej Avbelj, *Zadeva Patria – (ne)pravo v kontekstu,* 26 PRAVNA PRAKSA (2014).

[66] Mr. Masleša has, however, repeatedly refuted these allegations as false and malicious.

[67] Marko Pavliha, *Primer Masleša: (ne)uspeh Sodnega sveta?,* 7 PRAVNA PRAKSA 4-6 (2000).

Minister Miro Cerar, dismissed these public statements as too late to be accounted for in the appointment procedure[68] and reprimanded the critical judges for disrespect of their professional ethics.[69]

A few years later, then already as a President of the Supreme Court, Mr Masleša was presiding over a criminal chamber at the Supreme Court which convicted Mr Janez Janša, a president of the main opposition political party, for having accepted the promise of an unknown award at a vaguely determined time, at an undetermined place and by an undetermined mode of communication to use his influence, then as Prime Minister, to have a military contract awarded to the Finnish company Patria.[70] The case was from the very beginning conducted in an extremely unusual way, raising suspicions that this was a politically motivated persecution of the main political opponent. The case started by way of a direct indictment and hence avoided the procedural guarantees of an appellate review that an ordinary indictment is subject to. The indictment was brought by a state prosecutor who is a wife of an agent of the Slovenian communist secret-service police that arrested Mr. Janša as a political dissident during the reign of the communist regime in the late 1980s. The trial on all instances lasted for almost a decade and it had through media orchestration distortive effects on three general elections to the National Assembly, local elections as well as elections to the European Parliament.[71]

In the meantime, a Higher Court judge, Vesna Rakočević Bergant, in her academic extra-judicial writing publicly congratulated the District Court judge for the courageous sentencing (then not yet final) of the accused.[72] She likened the protest of the supporters of the sentenced in front of the court to the hysterical reactions of North Korean children at the visits of Kim Jong Un.[73] Mr. Masleša, however, added his part too with a thunderous performance in front of a crowd of judges gathered at the annual event "Days of Judiciary". He used that occasion for tirades against both the defendant, who at the time had an open deadline for a request for extraordinary legal remedy at the Supreme Court, as well as against one of the Constitutional Court judges. In addition, the very same supreme public prosecutor who achieved the final sentence in the Patria case was taking part at the event.[74]

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[68] However, the charges have been publicly known for more than 10 years.

[69] Sodni svet, *Zavarovanje dostojanstva in sodnikov in sodstva,* 49-50 PRAVNA PRAKSA 36 (2010).

[70] For an in-depth analysis of the case MATEJ AVBELJ, NEPRAVNA DRŽAVA (2015).

[71] Matej Avbelj, *How to Reform the Rule of Law in Slovenia, in* SLOVENIA: SOCIAL, ECONOMIC AND ENVIRONMENTAL ISSUES (Frane Adam ed., 2017).

[72] Vesna Rakočević Bergant, *Zakaj meni nihče ne piše sodb v Murglah?,* 23 PRAVNA PRAKSA 33 (2013).

[73] *Id.*, at 33.

[74] *See,* the official report from the event, at http://www.sodisce.si/vsrs/objave/2014060616053789/.

The final ruling in the Patria case was, eventually, voided by a unanimous decision of the Constitutional Court. The Constitutional Court found that the defendant had been convicted of an abstract criminal act, that the judges at all instances violated the principles of *lex certa*, *lex scripta* and *lex stricta* in criminal law and that, furthermore, Mr Masleša as the President of the Supreme Court and of the trial chamber himself also violated the requirement of impartiality and hence the constitutional guarantee of a fair trial.[75] However, in response to the Constitutional Court's decision, the Supreme Court argued that the latter simply arrived at a different interpretation of the law, while Mr. Masleša averred that he would have again acted the same. In a deeply politically split Slovenian environment, this reaction of the leadership of the Slovenian judiciary signalled an absolute lack of any self-criticism, refusal to take responsibility to foster justice more perfectly in the future. This has had a disastrous effect on the reputation of the Slovenian judiciary, which even the traditionally silent Slovenian legal academics did not hesitate to warn about. However, the blame for its sinking reputation the judiciary apportioned to the very few judges who publicly warned against this negative and unacceptable practice.

The most vocal with regard to the worrisome state of the Slovenian judiciary was Jan Zobec, then a justice at the Slovenian Constitutional Court. In his article, which was publicly condemned by the then President of the Supreme Court, Mr Masleša, for having opened the Pandora's box of discreditation of Slovenian judiciary,[76] he stressed:

> 'The paramount problem of the Slovenian judiciary is the judiciary itself. First of all, the politics residing inside it, which has been preserved as part of the heritage of the totalitarian era in form of obstinate mental patterns firmly rooted in the old regime, expressing itself in collectivist and corporatist mind-set. There, in the judiciary, this mind-set (as one form of the parallel, concealed, or deep state) thrives and feeds itself in terms of mode de pense, values and worldviews thanks to institutional closure and complacency. In a normal state with established democratic tradition and legal culture this would engender positive effects – it would foster what would already be there: internally, mentally independent judiciary. Unfortunately, in Slovenia it is also being fostered what there already is: anything but an intellectually autonomous and independent judiciary. 'Free riders', those who dare to think independently and critically (which ought to be inherent to each and every judge's intellect) are

[75] Constitutional Court Up-879/14, Up-883-14, Up-889/14 (April 20, 2015).

[76] *See*, President of the Supreme Court, Branko Masleša, addressing the Slovenian judges at the annual event "Days of Judiciary", official report available at: <www.sodisce.si/vsrs/objave/2014060616053789/> accessed 11 November 2014.

> side-lined, isolated and stigmatized as conflicting, litigious and simply weird individuals.'[77]

According to judge Zobec it

> "therefore comes as no surprise that such an 'independent' judiciary is presided by 'a secret favourite of judges' – like judiciary, like its President (who is autonomously chosen by the judges who, thus, also deserve him)… [As a result…]: "The politics needs to do nothing, it needs not to impact on the judiciary in anything or with anything in order to submit it to itself and to put it under its influence for the time to be. This influence is already there, inside the judiciary, and it has, so to speak, been always there."[78]

As a consequence, Slovenian judiciary is still widely regarded as a strong ally of the post-communist retention elite.[79] It has been argued, that the courts have, unable to withstand the strong political pressure, through legal enforcement furthered not the rule of law but partisan political interests.[80] Against this backdrop, it becomes also easier to understand why the public trust in the judiciary has been in a persistent decline since 2007[81] and is today the lowest among all the Member States of the European Union, with only 16% of Slovenian citizens expressing their trust in the judiciary.[82] The introduction of the judicial self-government in form of the Judicial Council has not alleviated these concerns, it might have even exacerbated them. This has certainly been the case in the recent appointment of the new President of the Supreme Court, Mr Damijan Florijančič, after the mandate of Mr Masleša had expired.

To provide a better understanding of a dwindling legitimacy and public distrust in the judiciary in Slovenia it is necessary to understand the historical *problematique* surrounding the appointment of the presidents of the Supreme Court. While the president of the Supreme Court represents and symbolizes the Slovenian judiciary as a whole, it has been one of the most symbolically and institutionally undermined statuses in Slovenia. The first president of the Supreme Court in the independent Slovenia was simply the last president

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[77] Jan Zobec, Mehki trebuh slovenskega sodstva, *Delo* (Dec. 8, 2012), www.delo.si/mnenja/gostujoce-pero/mehki-trebuh-slovenskega-sodstva.html (author's translation).

[78] *Id.*

[79] Bugarič, *supra* note 63, at 13.

[80] *Id.*

[81] Miro Haček, *(Dis)trust into the Rule of Law in Slovenia,* 4 POLITICAL PREFERENCES 9, 19 (2013).

[82] Special Eurobarometer 461: Designing Europe's Future, http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/78720.

of the Supreme Court in the Socialist Republic of Slovenia. Ms. Francka Strmole, a high communist functionary, stayed in office till 1993. Thereafter the Supreme Court has had great difficulties in filling the position of its President. It has thus happened already three times that the President was not elected in good time. The Supreme Court was thus without a President first for three years, then for nine months and most recently for three months. The last round of appointment however, was turned into a farce, because of the way the Judicial Council conducted the nomination procedure.

To recall, the President of the Supreme Court is appointed by the National Assembly upon the proposal of the Minister of Justice. The latter proposes a candidate that has been recommended by the Judicial Council after having received the opinion of the Supreme Court sitting en banc. In the case of the appointment of the current President of the Supreme Court, Mr. Damijan Florjančič, the Supreme Court sitting *en banc* first proposed Mr Rudi Štravs as a candidate for its president to the Judicial Council. However, the latter refused Mr Štravs without stating any reasons. Upon fierce protests by a Supreme Court judge[83] and some academics,[84] the president of the Judicial Council, who failed to attend this important session, stated that no coherent statement of reasons could be given as the opinions on the candidate had been so much divided.[85] Consequently, the Minister of Justice decided not to appoint Mr. Štravs, since he did not receive the joints support of the Supreme Court and the Judicial Council. As a result, a new call was issued and Mr. Štravs, somehow defiantly, decided to run again. This time the Supreme Court *en banc*, while reaffirming its initial support of Mr. Štravs, decided to give its preference to another candidate: Mr. Florjančič. Both names were then sent to the Judicial Council, sitting in the same composition. The Judicial Council now decided to support Mr. Štravs, i.e. the very same candidate that it had turned down in the first round. In so doing, the Judicial Council again voted against the candidate chosen by the Supreme Court, once more failing to provide any justification for its decision.

However, this time around the Minister of Justice, despite the lack of a joint support by the Judicial Council and the judiciary for any of the candidates, proposed Mr. Florjančič to the National Assembly. While Mr. Florjančič was thus, finally, elected, it is clear that the entire process has been conducted in an extremely non-transparent manner, without any reasons given in favour or against the candidates by the Judicial Council. This has created an impression of an overall arbitrariness and has left a huge negative mark on the Judicial Council as well as on the thereby elected President of the Supreme Court, whose authority has thus been marred from the outset. Barbara Zobec, a Supreme Court Justice, publicly

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[83] Barbara Zobec, *Ponižano Vrhovno sodišče,* Finance (Sept. 19, 2016).

[84] Matej Avbelj, *Izbiranje predsednika Vrhovnega sodišča – slovenski sodni svet je farsa,* Finance (Sept. 19, 2016); Matej Avbelj, *Bo sodni svet zdaj odstopil?,* Finance (Dec. 17, 2016).

[85] Marko Novak, President of the Judicial Council in Odmevi, RTV SLO.

protested, referring to David Kosar's analysis of the Slovak Judicial Council, that this particular incident demonstrates that in Slovenia too the Judicial Council has been created to be captured.[86]

This particular example of Judicial Council's activity without giving reasons amenable to a critical review in a public debate, strengthened the objections of unaccountability of the Slovenian judiciary. The question of accountability has been notably in the shadow of the judicial independence that the Slovenian judiciary has been preoccupied with. This has prompted the political actors, the general public as well as some experts into observing that the independence has been used as a proxy for avoiding accountability. The Slovenian judiciary has been described as conceited, unable to develop its own degree of sound self-criticism,[87] and even less to cope with an external public expert or political critique.[88] However, when the pressure becomes insurmountable, as it has been the case with a revelation that the Slovenian judiciary simply lost, or failed to declare, hundreds of wills,[89] "the system", rather than the actually responsible individual actors have been blamed for the scandal. In a manner reflecting best the understanding of individual accountability in the judiciary, the enforcement of individual accountability was said to be counterproductive. Rather than remedying the malpractices, it would, by installing fear in those responsible, prompt them into hiding their misdeeds.[90] After all, the acting President of the Supreme Court commented on the occasion of the lost wills scandal,[91] the judiciary too "is subject to the right to be forgotten, of sorts."[92]

Marko Šorli, the former Vice President of the Supreme Court and a current Justice of the Constitutional Court Justice, argued that the lack of accountability is a systemic feature of the Slovenian judiciary stemming from the pre-modern model of judicial self-government which perpetuates the real-socialist strict hierarchical model of administering the courts.[93]

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[86] Barbara Zobec, *supra* note 83.

[87] To this result *see* also Mateja Končina Peternel, *Moč in avtoriteta sodnikov morata postati del nacionalne kulture,* 33 PRAVNA PRAKSA 3 (2015).

[88] *See* also Tomaž Pavčnik, *Kaj lahko sodstvo stori za ohranitev trajnega mandata?,* 46 PRAVNA PRAKSA 33 (2011).

[89] The media reported that since between 1945-1991 4384 wills were lost, and since 1991 additional 1000.

[90] Andreja Lončar, *Sodišču ne zaupajte svoje oporoke!,* SIOL, http://siol.net/novice/slovenija/sodiscu-ne-zaupajte-svoje-oporoke-427307.

[91] Between 1945 and 1991 the Slovenian judiciary failed to declare 4384 wills that were deposited by individuals at the courts to be declared in case of death. Almost additonal 1000 wills have not been declared since 1991. The judiciary simply displaced those wills and the entitled successors were hence deprived of their hereditary rights. The »system« rather than any actual individual has been blamed for this legal scandal. *See* Andreja Lončar, *Sodišču ne zaupajte svoje oporoke,* https://siol.net/novice/slovenija/sodiscu-ne-zaupajte-svoje-oporoke-427307.

[92] *Id.*

[93] Marko Šorli, *Neučinkovit sodni sistem – uspešno vodenje?,* 3 PRAVNA PRAKSA 3 (2013).

According to him, the presidents of the lower courts perform their duties only formally, while decisions are *de facto* taken at the peak of the hierarchy at the Supreme Court. Eventually, no one is accountable for the malfunctioning judiciary; as those wielding *de facto* powers are formally unaccountable, while those who are formally accountable cannot be responsible for the decisions practically made elsewhere. This strictly hierarchical, administrative structure resembling organization also curtails the individual independence of judges and makes them accountable to their superiors. This accountability is not just formal, but not infrequently grows into informal dependency, which translates into an overall lack of internal independence of judges, typical for post-communist countries.[94] For the superior judges do not control just the quality of decisions of those below them, by exercising the appellate review, they also decide on the fate of their careers by sitting in the Personnel councils, as well as on the variety of benefits (such as continuing education, attendance at conferences etc.) that could be used to further, or not, their careers. Jan Zobec, presently Supreme Court Justice, has described this situation as an example of a judicial oligarchy, closely resembling what Djilas has described as a new class.[95] Accordingly, the ruling judicial elite conceives of itself as being chosen for their interest, clan or class belongingness, rather than for their commitment to the rule of law.[96] The members of the judicial oligarchy cherish those by whom they were appointed and who provide them with advantages and tiny privileges – such as lectures at judicial schools, appearance in the media, support for their undeserved promotion (etc.), or who simply tolerate their incompetence.[97]

These critiques by the members of the judiciary themselves have had a strong echo among the general public. The Judicial Council, however, has largely ignored them or it has resorted to its traditional, but essentially decontextualized and consequently empty-meaning mantra of importance to respect the independence of judges and the judiciary as a whole. Other than the members of the alleged judicial oligarchy who felt directly affected by these remarks,[98] the judiciary too has largely ignored the problem. Internally, behind the closed doors, however, the Supreme Court's Annual conference 2017 was dedicated to the question of "unruly judges", facing a hard dilemma whether their public statements are still protected by the freedom of expression or they should be subject to disciplinary

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[94] *See*, in particular, Alan Uzelac, *Survival of the Third Legal Tradition,* 49 SUPR. CT. L. REV. 377-396 (2010); Alenka Kuhelj & Bojan Bugarič, *A Day in the Life of a Post-Communist Europe,* 8 THE HAGUE JOURNAL OF THE RULE OF LAW 183 (2016).

[95] MILOVAN DJILAS, NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM (1957).

[96] Jan Zobec, *Sodniški novi razred,* Finance (Aug. 22, 2016).

[97] *Id.*

[98] Nina Betetto, *Generali in vojaki,* Finance (Aug. 28, 2016).

procedures instead.[99] It appears that, eventually, the decision has been made that for now the "unruly judges" will not be subject to any sanctions.

Similarly, those judges who have perverted their accountability[100] have never been subject to any sanctions either. Since 2003, the Judicial Council on the basis of the then amended Courts Act adopted a system of evaluation of judges that has mostly been based on the quantified criteria, the so-called judicial norm.[101] As isolated judicial critical voices have warned, this system of judicial statistics has been manipulated, abused by judges, sometimes in a direct violation of judicial ethics, by all sorts of 'creative' means and techniques so that the productivity of a judge would appear much higher than his or her actual substantive, qualitative contribution to the law and dispute-resolution was.[102] In a response to this malpractice, in 2015 the Judicial Council adopted new criteria for evaluating judges, emphasizing quality over quantity of the judge's work.[103]

However, the reputation of the Slovenian judiciary has already been tarred. The perception has been growing that the judiciary is a self-regulating and self-interested caste, which uses the constitutional guarantee of independence to maximize its own particular, mostly welfare interests.[104] Cases of open conflict of interests between judges and parties in the cases involving large assets[105] and even criminal activities by judges[106] have led the public and the political sphere to demand a revocation of the judicial tenure system, on the basis of which the office of a judge in Slovenia is permanent. While the expert community has strongly opposed this move, it has simultaneously called for strengthening the accountability of judges. The judges in Slovenia have been said to be subject to the most

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[99] For an analysis, *see* Matej Avbelj, *Nova era ali po Masleši Masleša?,* Finance (Apr. 29, 2017).

[100] For a description of the phenomenon "of output perversion of accountability" more generally, *see* Kosar, *supra* note 8, at 68-72.

[101] See also Vavken, *supra* note 40, at 107-108.

[102] Tomaž Pavčnik, *Ta je zoper nas,* 9 PRAVNA PRAKSA 33 (2014).

[103] Vavken, *supra* note 40, at 118; Sodni svet RS, Merila za kakovost dela sodnikov za oceno sodniške službe (2015).

[104] One such notorious example was that of a judge who was appointed as a secretary general of the Government. While his judicial status was stayed, he also acted as an advocate in a case of his wife, filing a motion requesting all judges in Slovenia to recuse themselves as they are biased against him. The affair resulted in his stepping down from the governmental office. *See* Simona Toplak, *Afera Cerarjev generalni sekretar Darko Krašovec: sodnik, ki ne priznava sodišč, žena, ki ne plačuje davkov,* Finance (June 10, 2016) https://www.finance.si/8846026.

[105] The so-called affaire "Bankruptcy friends" in which the judges, lawyers and bankruptcy managers were partying together, exchanging presents etc. remained unsanctioned by the personnel councils, *see* https://www.rtvslo.si/crna-kronika/prijatelji-v-stecaju-brez-sankcij-za-vpletene-upravitelje-in-sodnike/314894.

[106] The case of the Judge of a District Court of Celje.

comprehensive and frequent supervision of their work.[107] They are accountable in disciplinary and criminal terms. They are subject to the review by the appellate jurisdiction and can be put under special supervision by the president of the court if a judge is believed to be systemically underperforming both in terms of quantity and quality of his or her work. This special supervision is mandatory if required by the president of the superior court, President of the Supreme Court or by the Minister of Justice.[108] However, in practice the accountability enforcing procedures remain very few, so that a notable gap exists between a *de jure* and a *de facto* accountability.[109]

The low legitimacy of the Slovenian judiciary, its (perceived) absence of independence, allegations of politicization and reluctance to take responsibility and to enforce accountability, increased the demands for transparency. This has, again, hit at the reluctance of the judiciary,[110] supported by conservative incrementalism of the Judicial Council.[111] The latter has, in principle, spoken in favour of transparency, but it has simultaneously called for cautiousness, in order not to be reforming too much at once. However, the initially few expert voices, supported by the general public, demanded the publication of all decisions of the courts, so that they could be publicly discussed and critically evaluated by the academia. Judges names should be published too[112] and the press should be allowed to publish their photos. Finally, even the ordinary judges, at least at the Supreme Court, would need to be allowed to write dissenting or concurring opinions. The judiciary, especially the leadership of the Supreme Court, has tried to slow down this development as much as possible,[113] but the Ministry of Justice, also subject to the critique of the Judicial Council, has made a strong case for a greater transparency in judiciary. This is important because it is the transparency which in practice creates the conditions that foster a *de facto* accountability and independence of judges, whose faces, names and expertise is finally at the disposal of the expert community and of the general public, in whose name, after all, the judicial decisions are eventually made. However, most of the proposals of the Ministry of Justice, including the publication of dissenting opinions at the Supreme Court as well as the so-called Judicial Supervisor, an application which

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[107] Vavken, *supra* note 40, at 77, quoting the then Vice-President of the Supreme Court.

[108] Judicial Service Act, Arts. 79a,b,c.

[109] *See*, e.g., an interview with the former President of the Supreme Court, Mitja Deisinger, who in 2000 (still) explained that the data on the initiated disciplinary procedures are classified and that also in other countries such procedures are extremely rare. Bojan Kukec, *Slovensko sodstvo na poti v Evropsko unijo: intervju s predsednikom Vrhovnega sodišča RS Mitjo Deisingerjem,* 6 ODVETNIK 3 (2000.

[110] *See*, e.g., Nina Betetto, *Koliko neodvisnosti je dovolj?,* 48 PRAVNA PRAKSA 3 (2015).

[111] *See*, e.g., Judicial Council, *Sodstvo je velik, vendar zelo občutljiv sistem,* 7-8 PRAVNA PRAKSA 3-4 (2006).

[112] *See*, e.g., Blaž Mrva, *Za objavo imen sodnikov v objavljenih sodbah,* 6-7 PRAVNA PRAKSA, 21 (2012).

[113] For a critique, *see* Matej Avbelj, *Slovenski pravosodni meritokratski deficit,* Ius kolumna (March 13, 2017).

would enable the publication of all first instance rulings of the courts, at the time of writing remained unrealized.

It follows from the above discussion that the Judicial Council as a constitutionally mandated body of judicial self-government in Slovenia has so far had a relatively limited impact on the independence, accountability, legitimacy, transparency of and confidence in the judiciary. As we have seen, there have even been cases in which the (in)action of the Judicial Council has affected negatively the values specified.[114] The main reasons for this limited contribution of the Judicial Council rest in the fact that its formal competences have not been met by the actually existing, material capacity for executing them in practice. The Judicial Council has traditionally been under-institutionalized,[115] understaffed and underfunded.[116] The epicentre of the judicial self-government has therefore remained elsewhere, in the hands of the presidents of the courts and, the President of the Supreme Court in particular. The system has increasingly adopted the characteristics of judicial corporatism, which has been due to its oligarchic structure also susceptible to, especially informal, political influences, while giving the impression of *de jure* impeccability of the overall system.[117] This *de jure* polished-up image however has had considerable and growing difficulties in explaining the mounting number of convictions of Slovenia before the ECtHR[118] and to respond to the external reports, which have demonstrated that in comparative terms the Slovenian judiciary is expensive, very inefficient, featuring the highest number of judges per capita in Europe[119] and at the same time enjoying one of the lowest ratings in public trust.[120]

The seemingly politically motivated trials, the proverbial incapacity of the judiciary to sanction dangerous forms of crime, white collar crime, corruption cases and, in particular, cases of banking and economic criminality created an increasing impression of an overall failure of justice in Slovenia. This feeling has been reinforced by a growing perception of

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[114] *See* also Jernej Letnar Černič, *Med Scilo in Karibdo,* Ius kolumna (Sept. 16, 2016).

[115] Marko Novak, *Institucionalna podhranjenost slovenskega sodnega sveta,* 23 PRAVNA PRAKSA 17 (2013).

[116] *See* Marko Novak, *Navidezna moč slovenskega Sodnega sveta,* Ius kolumna (July 4, 2016).

[117] The members of the Judicial Council have, however, denied that, *see* Irena Vovk, *Zavrnili očitke o cehovski solidarnosti,* 38 PRAVNA PRAKSA 4-5 (2003).

[118] By 2016 Slovenia has been convicted by European Court of Human Rights in 341 cases, which makes it a leading country in terms of the number of violations found per capita.

[119] The huge number of judges is a legacy of a communist past and a result of a failed attempt to improve the efficiency of judiciary in Slovenia by increasing the number of judges. The latter was done as part of the Lukenda program in response to the eponymous ruling of the European Court of Human Rights which proclaimed the violation of the right to a speedy trial as a systemic problem in Slovenia (Lukenda v. Slovenia, no. 23032/02).

[120] *See*, recently, European Commission, Justice Scoreboard 2016.

judicial bias in favour of those with power, either economic, political or both, while the common people have to endure the lengthy trials, where justice is either delay or denied to be eventually found only in Strasbourg. The centre-right part of the political spectrum started to use this popular dissatisfaction with the judiciary, labelling it the System of Injustice [*Krivosodje*], as part of its political fight which could in the future pave the way to a further institutional undermining of the already faltering judiciary. The judiciary, on its behalf, has reacted defensively, even more playing down the objective problems that it internally has, while the judicial elite has used this opportunity to consolidate and strengthen its position further, making any change, in particular of a structural character, increasingly unlikely. In all of this, the Judicial Council has played a relatively passive role, being effectively governed by judges, it has satisfied itself with a *de jure* existence of the constitutional values regulating the status of the Slovenian judiciary, by paying very little or even no attention how these values are actually effectuated in practice.

D. Repercussions of Judicial Self-Government for the Principle of Separation of Powers and the Democratic Principle

The Constitution of the Republic of Slovenia in 1991 for the first time after the WWII introduced the system of separation of powers. Article 3 of the Constitution lays down the principle of democratic legitimacy-chain, according to which in Slovenia power is vested in the people who, as citizens, exercise it directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers.[121] The Constitution thus introduced a systemic change in the functioning of the state. Most importantly, an independent Constitutional Court with actual powers was created. It acts as a check on the arbitrariness or human rights violations by the judiciary in the individual cases as well as a guarantor of legality and constitutionality against the potential encroachments by the legislature or the executive branch. Recently, the ordinary judiciary has been voicing protests that the Constitutional Court has been overstepping its competences, interfering with the powers of the ordinary courts, and in particular with the rulings of the Supreme Court on an increasingly unconvincing, sometimes even arbitrary grounds.[122] Secondly, the judiciary was established as an independent power, free of direct political influence of the ruling party. Finally, while in the relationship between the parliament and the executive several elements of the system of undivided power have been preserved, this relationship too has moved more closely to a model of government typical of the consolidated parliamentary systems.[123]

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[121] Art. 3 Constitution.

[122] *See*, e.g., Vladimir *Balažic, Arbitrarnih odločb vrhovnega in ustavnega sodišča enostavno ne sme biti,* Delo (June 10, 2017).

[123] Occasionally, however, relicts of the old system resurface in practice. Such was a "Commitment between the Government and the Judiciary to Improve the State of Judiciary" agreed in 2013 http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/PDF/131002_podpisana_ZAVEZA.pdf.

The establishment of a Judicial Council as a key body of judicial self-government cannot be seen as a significant change in the system of separation of powers on its own. It is rather instrumental to the overall constitutionally mandated objective of ensuring the existence of a judiciary as an independent branch of power. The new Constitution has thus introduced a model of judicial (self)-government in which the courts are separated from other institutions of the state (the separation of institutions), they exercise separate, i.e. judicial function (the separation of functions) which can be only conducted by judges that cannot take part in any other institution of the state (the personal incompatibility). On this basis a dense system of checks and balances between the courts, the legislature and the executive has been created, with a Judicial Council playing an important role in its midst.[124]

The system of checks and balances is based on the principle of a democratic legitimacy chain. The citizens elect the National Assembly, which appoints the government, including the Minister of Justice. The Judiciary is an independent branch. The courts and judges, however, rule in the name of the people, to whom they are, eventually, accountable by way of adhering to the highest constitutional standards, valid laws, professional rules and principles governing the overall judicial integrity. The judiciary itself is foremost called upon to enforce these standards, but the external control by the legislative and the executive branch is ensured via the Judicial Council. The majority of the Judicial Council are judges, elected among themselves, which is said to be a guarantee of judicial independence. The National Assembly, as a representative of the people, appoints the remaining members and in so doing ensures a democratic control in the Judicial Council itself. The democratic control of the judiciary by the people represented in the National Assembly in Slovenia is strengthened further by the fact that it is the National Assembly which appoints the judges. In recent years the National Assembly, as we have seen above, has indicated that it understands its appointment powers not to be only formal, but that a substantive review and even the refusal of the candidates for a judicial post is a real possibility.

The National Assembly, upon the proposal of the government, also adopts the legal framework for the functioning of the judiciary and it ensures, again by way of governmental proposals, that the judiciary's share in the national budget suffices for a viable exercise of its constitutional powers. The overall organization of the judiciary is decided on the axis between the President of the Supreme Court, the Minister of Justice with a, typically, consulting involvement of the Judicial Council. Almost any change in the structure and functioning of the judiciary in Slovenia must be translated into a statute and has to win a legislature's approval. Both the judiciary and the Judicial Council have objected that the legislative changes are too numerous, absent of an overall vision of the

[124] *See,* e.g., Marijan Pavčnik, *Sodstvo, delitev oblasti in ustava,* 6-7 PODJETJE IN DELO 1513-1522 (2006).

functioning of the judiciary and without the latter being adequately involved in the preparation of the legislation.[125]

As it has been explained in Part II, in relationship with the National Assembly the Judicial Council has the power of nomination and a duty of reporting about its activities and about the overall state of the Slovenian judiciary. In relationship with the Minister of Justice, the Judicial Council provides opinions and has a number of rule-making powers to which either the consent or the opinion of the Minister of Justice is required. However, the role of the Ministry of Justice, in particular with regard to the selection of judges, has been diminished through successive legislative amendments in favour of the Judicial Council.[126] In relationship with the judiciary, the Judicial Council makes a selection of candidates for a judicial service, appoints the presidents of the courts (other than the Supreme Court), supervises the management of the judiciary, adopts quality standards for the functioning of the judiciary, of the personnel councils etc. It also acts as an appellate instance in the disciplinary and other procedures, and it is consulted in other issues related to court management provided by the law. The Ministry of Justice is politically responsible for the functioning of the judiciary in Slovenia. It proposes the candidate for the President of the Supreme Court, drafts and oversees the legislation, prepares and monitors the use of the budget, oversees the judicial statistics and can administratively supervise the management of cases as well as the overall governance of individual courts.

E. Conclusion

If our focus was limited only to a legalistic functioning and organization of the checks and balances with regard to the judiciary and its self-government an almost unobjectionable image of Slovenian judiciary would emerge. The same could be said of its democratic predicaments, in particular the requirement that also the judiciary is, eventually, both in its output as well as input legitimacy in service of and dependent on the people. However, this paper has deliberately eschewed the exclusively legalistic approach, which too often prevails in legal scholarship concerned with judicial governance. The paper has attempted, within what its limited scope has permitted, to situate the system of judicial self-government in the Slovenian socio-political context in order to provide an insight into how the judicial self-government really works and to what an extent it falls short of the normative ideals prescribed to it in the Slovenian positive law.

We have observed that there exists a yawning gap between the judicial self-government on books and the one that takes place in the actual practice. The remnants of the communist totalitarian past and the dense formal and informal networks in a relatively small legal and political Slovenian community have been used to manipulate the legal

[125] *See* the report by Irena Vovk, *Nedomišljene sodne reforme,* 24-25 PRAVNA PRAKSA 37 (2013).

[126] *See*, e.g., Aleš Zalar, *Minister za pravosodje, Sodni svet in sodniki,* 6-7 PODJETJE IN DELO 1280 (2002).

system of judicial self-government so to detract rather than to contribute to the values and principles associated with judiciary in a well-functioning constitutional democracy.

Articles

German Judicial Self-Government – Institutions and Constraints

By Fabian Wittreck[*]

Abstract

Typically, Germany is portrayed as a *persistent objector* to Judicial Self-Government in any form. The present paper will demonstrate that this position is untenable: Actually, the German judiciary disposes of a differentiated system of institutions of self-government. The effects of these institutional settings on core values like independence and accountability proves to be mixed at best, however. Furthermore, there are practically no proponents of a stronger version of self-government to be reckoned with. Indeed, the Italian-style model of self-government or the visions of the CCJE are basically contrary to the prevailing German understanding of democratic legitimacy and separation of powers; moreover, the long lasting recruiting pattern of the German judiciary will act as a powerful obstacle. Ultimately, even the introduction of a strong self-government via constitutional amendment remains an open question.

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A. Institutions of Judicial Self-Government

Comparative accounts of national systems of court administration tend to portray Germany as kind of counter-pole to the "Italian Model" of Judicial Self-Government.[1] While it is true that the German judiciary does not have a powerful "Judicial Council" at its command, the prevailing view is too short-sighted in terms of the German reality. In fact, the German legal system knows quite a couple of institutions or mechanisms securing a sufficient influence of judges on court administration (especially in personnel matters).[2] Altogether, eight institutions or legal mechanisms merit to be mentioned.[3]

I. Presidia (Präsidien)

The presidia are closely connected with the peculiar German understanding of the "legal" or "ordinary" judge. According to this principle (enshrined in Article 101 para. 1 cl. 2 of the *Grundgesetz* or Basic Law),[4] everyone has the fundamental right to be judged by the judge prescribed by the law. As a matter of fact, this means that at any German court regulations have to be enacted determining the responsible judge for any case in advance. Normally, this system of "blind" allocation leads to a distribution of cases on the basis of the name of plaintiff (civil matters) or defendant (criminal matters). So, at the start of each year it is perfectly clear that judge A for example will have jurisdiction to hear all cases filed by claimants with names starting with the letters D-G.[5]

Even more important is the fact that this allocation is not enacted by the Ministry of Justice or the presidents of the courts but by a committee of judges elected by their judge members (one has to add that the president of the court is a legal member of the panel).[6]

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[1] *See* C. Frank, *Judicial Self-governance: A Role Model for Germany, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 97, 99-100 (P.-A. Albrecht & J. Thomas eds., 2009).

[2] Instructive N. Garoupa & T. Ginsburg*, Guarding the guardians. Judicial councils and judicial independence,* 57 AM. J. COMP. L. 103 (2009); the authors also cover German institutions.

[3] Essential German reading on court administration in Germany: F. WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT (2006); M. MINKNER, DIE GERICHTSVERWALTUNG IN DEUTSCHLAND UND ITALIEN 25 et seq. (2015); L. C. FAISSNER, DIE GERICHTSVERWALTUNG DER ORDENTLICHEN GERICHTSBARKEIT IN FRANKREICH UND DEUTSCHLAND 251 et seq. (2018). – Recent overviews in English by A. Seibert-Fohr*, Judicial Independence in Germany, in* JUDICIAL INDEPENDENCE IN TRANSITION 447, 453 et seq. (A. Seibert-Fohr ed., 2012); P. LANGBROEK & M. WESTENBERG, COURT ADMINISTRATION AND QUALITY WORK IN JUDICIARIES IN FOUR EUROPEAN COUNTRIES 59 et seq. (2018).

[4] English version available at https://www.gesetze-im-internet.de/englisch_gg/index.html.

[5] *See* P. Dyrchs, W. Frey, P. Metzen, R. Napierala & H. Rausch, *Case assignment in German courts: North-Rhine Westphalia, in* THE RIGHT JUDGE FOR EACH CASE. A STUDY OF CASE ASSIGNMENT AND IMPARTIALITY IN SIX EUROPEAN JUDICIARIES 215 (P. Langbroek & M. Fabri eds., 2007).

[6] According to section 21a para. 2 the presidium consists of the president of the court and four to ten judges (depending on the size of the court). These members are elected by their fellow judges in a direct and secret vote (section 21b para. 3).

Moreover, the members of the presidia (German: Präsidium [sing.] or Präsidien [pl.]) enjoy judicial independence while allocating the caseload.[7] The relevant regulation is to be found in sections 21a-21j of the Courts Constitution Act (*Gerichtsverfassungsgesetz*).[8]

II. Councils of Judges (Richterräte)

As the concept of employee participation or "Mitbestimmung" is very strong in Germany,[9] also judges enjoy some form of influence on their working environment. To picture this is quite complicated, as there are two types of participation bodies, and each *Bundesland* or federal state has different rules on the exact competences of these panels (the same is true for the *Bund* or federal level).[10] According to this, the following is only a very broad overview. Basically, the judges elect two types of councils (see sections 49-60 of the German Judiciary Act or *Deutsches Richtergesetz*).[11] As a rule of thumb, the councils of judicial appointment or *Präsidialräte* are competent only in the limited field of appointment and advancement. The (general) councils of judges (*Richterräte*) participate in all other questions which may be relevant for the professional live of judges. As the German *Länder* have different traditions of participation (generally, states with a Social Democratic tradition will have stronger participation mechanisms than those with a tradition of Christian Democratic government), the catalogues of matters open to judges' participation vary greatly. Moreover (to further complicate things once again), one has to distinguish matters of mere involvement and matters of real participation (see section 52 of the Judiciary Act that refers to the Federal Personnel Representation Act). While in the first case the judges only have the possibility to voice their opinion, in the second case they can practically veto a measure of the court administration. A much-debated current issue is the digitization of the judiciary (e.g. the electronic file or docket, and other measures).[12] As it will profoundly change the working-place of judges, it is usually a matter of participation. The exact extent or veto position depends on each *Land*; while the judges in

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[7] *Bundesverfassungsgericht* [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT 910 (2008); H. D. JARASS & B. PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR (15th ed. 2018), Article 97 note 3.

[8] English version: https://www.gesetze-im-internet.de/englisch_gvg/index.html.

[9] First overview: Seibert-Fohr, *supra* note 3, at 459-60; M. Weiss*, Labor Law, in* AN INTRODUCTION TO GERMAN LAW 299, 310 et seq. (M. Reimann & J. Zekoll eds., 2nd ed. 2005). – *See Bundesverfassungsgericht* [Federal Constitutional Court], 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 36, 69.

[10] As far as can be seen, there is no more English literature on the topic. Even the German literature is scarce, as the topic is deemed to be uninspiring due to its love for the details. *See* Wittreck, *supra* note 3, at 275 et seq., 372 et seq.; and Minkner, *supra* note 3, at 249-50, 278 et seq.

[11] Available in English: https://www.gesetze-im-internet.de/englisch_drig/index.html.

[12] *See* U. Berlit, *eJustice, eAkte und Richterschaft*, 121 BETRIFFT JUSTIZ 15 (2015).

North Rhine-Westphalia have a strong position,[13] the judges in most other states will not be able to stop "Justice 4.0".

III. Councils of Judicial Appointment (Präsidialräte)

Once again, there are seventeen different councils of judicial appointment in Germany (see sections 49, 54 to 59 of the Judiciary Act for the councils of the federal courts; each *Land* has its own rules which must abide to sections 74 and 75 of the [Federal] Judiciary Act).[14] According to those basic rules, the councils shall be composed of a president of the court, who acts as chairman, and of judges, of whom at least one half are to be elected by the other judges (section 74 para. 2). The council shall be asked to participate in the appointment of a judge to an office with a final basic salary that is higher than the final basic salary of an initial office.[15] It shall deliver a written opinion, with reasons, on the judge's personal and professional aptitude (section 75 para. 1). Due to the chairmanship of a president, the councils of judicial appointment may not count as "genuine" institutions of self-government (in fact, many councils are dominated by strong presidents). The effective influence of the *Präsidialräte* on the process of promotion varies greatly; the most influential council is those in the southern state of Baden-Württemberg: If a consensus on a personnel measure is not to be found, the decision is devolved to the *Richterwahlausschuss* or judicial selection committee which is in this case dominated by judges elected by their peers (*see infra* A.VII.).[16]

IV. Service Courts (Richterdienstgerichte)

By far the most important institutions of judicial self-government in Germany are the service courts or *Richterdienstgerichte*.[17] Basically, they function as guardians of judicial independence. According to section 26 para. 3 of the Judiciary act, "[w]here a judge contends that a supervisory measure detracts from his independence a court shall, on application being made by the judge, give a ruling in compliance with this Act." Moreover, the service courts have the last word whenever a judge is removed from office, transferred

[13] According to section 41 para. 3 of the North-Rhine Westphalian State Act on Judges and Prosecutors, the councils of judges have to participate in matters of technology (in detail *see* No. 1-6).

[14] *See* Wittreck, *supra* note 3, at 292 et seq., 361 et seq.; Seibert-Fohr, *supra* note 3, at 460-1; Minkner, *supra* note 3, at 247-8, 274 et seq.

[15] This is the quite awkward circumscription of "promotion" in the Judiciary Act.

[16] *See* sections 46 et seq. of the State Act concerning judges and prosecutors (especially section 43 para. 6 and section 58). According to many critics, the composition of this committee is not in accordance with the German understanding of democratic legitimacy (*see* below B.II.): Wittreck, *supra* note 3, at 400.

[17] *See* Wittreck, *supra* note 3, at 300-1, 389 et seq.; Seibert-Fohr, *supra* note 3, at 491-2; Minkner, *supra* note 3, at 250, 283-4.

to another court against his will or is disciplined in any other way (section 62 para. 1 No. 1-4 of the Judiciary Act). Thus, virtually any measure of court administration that could pose a threat to judicial independence may be reviewed by the service courts with the last word remaining in the hands of (fellow) judges. The service courts themselves are staffed by the presidia *(supra* A.I.) of the courts (see section 61 para. 3 of the Judiciary Act) and are therefore practically free of any influence of the court administration. The judicature of the service courts is prone to criticism from academia, as it is deemed to be partisan or biased vis-à-vis the vested interests of the judiciary.[18] Two examples: According to judgments of the service courts, German judges are not bound to obligatory office hours,[19] and they are entitled to get a personal key to enter the courthouse at any time if they wish[20] – both measures obviously make sense, but it is not in the same way obvious that they are mandatory in terms of judicial independence.[21]

A recent case punctuates the limits of this mechanism of judicial group solidarity.[22] A judge of a Higher regional court (*Oberlandesgericht*)[23] had been censured because of an improper mode of executing his official duties (combined with urging proper and prompt attention to those duties; see section 26 para. 2 of the Judiciary Act) by his court's president. The main allegation was that the number of cases decided by him was well below the average number concluded by his colleagues at the respective court. He

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[18] *See* Wittreck, *supra* note 3, at 177-8 and H. Schulze-Fielitz, *Article 97*, *in* 3 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2018), note 35.

[19] *Bundesgerichtshof* [Federal Court of Justice], 113 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 36, 40-1; *Bundesverwaltungsgericht* [Federal Administrative Court], 78 Entscheidungen des Bundesverwaltungsgerichts [BVERWGE] 211, 213-4.

[20] *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 282, 283 (2003).

[21] *See* F. Wittreck, *Dritte Gewalt im Wandel,* 74 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 115, 137 (2015).

[22] Last Decision: *Bundesgerichtshof* [Federal Court of Justice] (as Federal Service Court), NEUE JURISTISCHE WOCHENSCHRIFT 158 (2018); upheld by *Bundesverfassungsgericht* [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT 1532 (2018). – As far as can be seen, there are no English publications on the case. From the German literature, *see* F. Wittreck, *Durchschnitt als Dienstpflicht?*, NEUE JURISTISCHE WOCHENSCHRIFT 3287 (2012); F. Wittreck, *Erledigungszahlen unter (Dienst-)Aufsicht?*, DEUTSCHE RICHTERZEITUNG 132 (2013); C. Schütz, *Durchschnitt soll doch Dienstpflicht sein*, 112 BETRIFFT JUSTIZ 378 (2012); A. Thiele, *Die Unabhängigkeit des Richters – Grenzenlose Freiheit?* 52 DER STAAT 415 (2013); C. Schütz, *Die Richtgeschwindigkeit der Justiz*, FRANKFURTER ALLGEMEINE ZEITUNG – EINSPRUCH (Nov 29, 2017).

[23] For a general outline of the German court structure *see* K. M. Holland, *The Courts in the Federal Republic of Germany, in* THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES 83 (J. L. Waltman & K. M. Holland eds., 1988) and J. BELL, JUDICIARIES WITHIN EUROPE. A COMPARATIVE REVIEW 110 et seq. (2006); G. ROBBERS, INTRODUCTION TO GERMAN LAW (6th ed. 2017), notes 37 et seq.; recently S. Machura, *Understanding the German Mixed Tribunal,* 36 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 273 (2016). – German Reading: C. Degenhart, *Gerichtsorganisation, in* 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 114 (J. Isensee & P. Kirchhof eds., 3rd ed. 2007) (leading handbook on German constitutional law).

contended that this supervisory measure undermined his independence and brought an action against the court administration to the service courts. His main allegation was that this censure had the ill-disguised intention to change his application of the law (which is the very heart of judicial independence). As a matter of fact, the service courts had rejected any supervisory measures that attempted to change the way in which the judge had previously chosen to reach a decision (e.g. by urging more sessions per week or a "firmer" conduct of proceedings).[24] In the case of the censored judge, the service courts ignored this issue and concluded that a detraction of his independence would only occur if he would be obliged to handle a caseload too heavy to be duly decided by an average judge.[25] Thus, they simply ignored the relevant question: Who is competent to decide how much time is to be devoted to a single case? Implicitly, the service courts have ruled that this is to be done by the court administration, not by the competent judge/judges.

V. Criminal Courts (Judicature on "Rechtsbeugung" or Penal Liability)

Technically, the German criminal courts are not part of the court administration system. Nevertheless, they belong to a system in which only judges decide in matters of other judges (one may speak of *functional* service courts [*supra* A.IV.]). According to German criminal law, a judge may be held liable for perverting the course of justice (or "Rechtsbeugung", section 339 of the German Penal Code or *Strafgesetzbuch*).[26] Due to the minimum penalty of one year's imprisonment, the offence is considered a crime or felony (section 12 para. 1 of the German Penal Code). Thus, according to section 24 no. 1 of the Judiciary Act, a judge convicted for an act of *Rechtsbeugung* will lose his position without a further judicial proceeding.

However, the threshold is high: A judge will only be held liable of perverting the cause of justice in the case of a serious and intentional infringement of the law. Basically, the judge has to write down in the grounds that he knows that the law orders A whereas deliberately ordering B. Even blatant errors in the application of the law do not count as *Rechtsbeugung* if the judge does not act deliberately. Due to this interpretation, convictions are truly exceptional. In particular, the German judiciary was very reluctant (to put it mildly) to convict fellow judges for blatant breaches of the law during the Nazi

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[24] *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 421, 423 (1988); *Bundesverwaltungsrecht* [Federal Administrative Court] 46 BVERWGE 69, 71; *see* Schulze-Fielitz, *supra* note 18, note 30-1.

[25] *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 158 (2018) (head note 2).

[26] English version: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html. Section 339 reads as follows: "A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable to imprisonment from one to five years." General outline of the German criminal law system: Robbers, *supra* note 23, notes 246 et seq.

dictatorship[27] (as they did not count as "colleagues", the judges of the former German Democratic Republic were another matter after re-unification in 1990).[28] Two recent cases may highlight the threshold which a judge has to exceed in order to become unbearable for his fellow judges: In 2009, a judge responsible for guardianship cases was condemned because he had routinely ordered enthrallment measures for bedridden elderly people without hearing them (in fact, he even forged the details of the hearings).[29] And recently (2017), a young judge has been convicted who coerced an exhibitionist to confess and to consent to a therapy by putting him in a detention cell for a few minutes.[30]

VI. Civil Courts (Judicature on Amtshaftung or Civil Liability)

In contrast to many jurisdictions worldwide,[31] the German judiciary is not protected by an immunity clause. Nevertheless, the rules on *Amtshaftung* or civil liability fulfill the same function.[32] Section 839 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*) holds an official liable for compensation if he "intentionally or negligently breaches the official duty incumbent upon him in relation to a third party".[33] However, this general rule is partly revoked with reference to the judiciary. Section 839 para. 2 of the Civil Code (the so-called "judicial privilege" or "Richterspruchprivileg") reads as follows:

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[27] *See* R. Wittmann, *Tainted Law: the West German Judiciary and the prosecution of Nazi War Criminals, in* ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 211 (P. Herberer & J. Matthäus eds., 2008); essential German reading: H. WROBEL, VERURTEILT ZUR DEMOKRATIE. JUSTIZ UND JUSTIZPOLITIK 1945-1949 (1989) and J. REQUATE, DER KAMPF UM DIE DEMOKRATISIERUNG DER JUSTIZ (2008).

[28] *See* M. Bohlander, *"United We Stand …" – The Judiciary in East Germany after the Unification,* 21 ANGLO-AMERICAN LAW REVIEW 415 (1992). German reading: U. HOHOFF, AN DEN GRENZEN DES RECHTSBEUGUNGSTATBESTANDES: EINE STUDIE ZU DEN STRAFVERFAHREN GEGEN DDR-JURISTEN (2001); H. C. Schaefer, *Überzogenes Richterprivileg,* NEUE JURISTISCHE WOCHENSCHRIFT 734, 735 (2002); J. Lehmann, *Der Rechtsbeugungsvorsatz nach den neueren Entscheidungen des BGH,* NEUE ZEITSCHRIFT FÜR STRAFRECHT 127, 129 (2006).

[29] *Bundesgerichtshof* [Federal Court of Justice], NEUE ZEITSCHRIFT FÜR STRAFRECHT 92-3 (2010).

[30] *Bundesgerichtshof* [Federal Court of Justice], NEUE ZEITSCHRIFT FÜR STRAFRECHT 106 (2013); *Landgericht Kassel* [District Court Kassel], judgment of June 27, 2017 – 11 KLs 3600 Js 37702/09; *see* the comment by B. Hecker, JURISTISCHE SCHULUNG 1042 (2012) as well as the critical note on the further proceedings by G. Kirchhoff*, Kein-Urteil-Schelte,* 118 BETRIFFT JUSTIZ 102 (2014). Highly sceptical also G. Kirchhoff & C. Schütz, *Böswillige Vernichtung einer Existenz,* 113 BETRIFFT JUSTIZ 40-1 (2018 [BETRIFFT JUSTIZ – literally "Concerning the judiciary" – is a left-leaning journal with strong ties to the "Neue Richtervereinigung", *see infra* C.II.]).

[31] *See* A. A. OLOWOFOYEKU, SUING JUDGES. A STUDY OF JUDICIAL IMMUNITY (1993).

[32] *See* J. P. Terhechte, *Judicial accountability and public liability. The German „judges privilege" under the influence of European and international law,* 13 GER. L. J. 313 (2012); Seibert-Fohr, *supra* note 3, at 494-5. – German reading: Wittreck, *supra* note 3, at 150 et seq.; M. BREUER, STAATSHAFTUNG FÜR JUDIKATIVES UNRECHT. EINE UNTERSUCHUNG ZUM DEUTSCHEN RECHT, ZUM EUROPA- UND VÖLKERRECHT (2011). *See* also Robbers, *supra* note 23, at notes 267 et seq.

[33] English version: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

> If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function.

The most important term is 'criminal offence'. A German judge is only liable if his breach of duty relates to *Rechtsbeugung* – as we have already seen, the courts will only assume this in cases of outright and evident failure (*supra* A.V.). Practically, German judges are therefore financially unaccountable. Recently, some breaches have been blown into this armor by the European Court of Justice who holds at least the member states of the Union liable for violations of the Union law committed by member states courts.[34]

VII. Committees for the Selection of Judges (Richterwahlausschüsse)

According to the *Grundgesetz*, the judges of the highest Federal courts are to be elected by a joint decision of the competent minister and a selection committee consisting of 16 members of parliament and the 16 competent state ministers (Article 95 para. 2 Basic Law).[35] As Article 98 para. 4 Basic Law states, the *Länder* may establish similar committees (again deciding jointly with the minister of justice).[36] While the Federal committee sits without judges and therefore may not be regarded as an institution of *judicial* self-government, more than half of the German states (Baden-Württemberg, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Rheinland-Pfalz, Schleswig-Holstein, and Thüringen) have decided to install *Richterwahlausschüsse*. Once again, the diversity is astonishing. Typically, these committees consist of a majority of members of parliament and a minority of judges either elected by their fellow judges or sitting *ex officio* (typically as presidents of the highest courts);[37] some states also involve a lawyer who likewise is elected by his peers. The committees' powers are also diverse; some decide only in the

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[34] *See* European Court of Justice, Case C-224/01, Köbler, judgment of Sept. 30, 2003, ECLI:EU:C:2003:513; Wittreck, *supra* note 3, at 154 et seq.; B. J. HARTMANN, ÖFFENTLICHES HAFTUNGSRECHT 216 et seq., 247 et seq. (2013).

[35] *See* D. ten Brinke, *Judges appointed by Parliament: Germany, in* JUDGES IN THE SERVICE OF THE STATE? PROCEDURES, CRITERIA AND POLITICAL INFLUENCE ON NATIONAL SELECTION OF JUDGES FOR THE HIGHEST JUDICIAL OFFICES AND THEIR POSSIBLE INFLUENCE ON THE INTERNATIONAL CRIME COURT 39 (D. ten Brinke & H.-M. Deml eds., 2002); Seibert-Fohr, *supra* note 3, at 461; German literature: Wittreck, *supra* note 3, at 305-6; H. Schulze-Fielitz, *Artikel 95, in* 3 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2018), note 24 et seq. – *See Bundesverfassungsgericht* [Federal Constitutional Court] , 143 BVERFGE 22.

[36] *See* Wittreck, *supra* note 3, at 396 et seq.; T. E. DIETRICH, RICHTERWAHLAUSSCHÜSSE UND DEMOKRATISCHE LEGITIMATION (2007); K. F. Gärditz, *Richterwahlausschüsse für Richter im Landesdienst. Funktion, Organisation, Verfahren und Rechtsschutz,* ZEITSCHRIFT FÜR BEAMTENRECHT 109 (2011); H.-J. Graefen, *Probleme der Richterwahl, in* VOLKSSOUVERÄNITÄT, WAHLRECHT UND DIREKTE DEMOKRATIE 127 (H.-H. v. Arnim ed., 2014).

[37] This was the case in Hessen; *see* W. Priepke, *Zusammensetzung des Richterwahlausschusses,* DEUTSCHE RICHTERZEITUNG 11 (1972).

case of the first appointment, some also in the case of promotions. The committee in Baden-Württemberg is very peculiar: It comprises a majority of judges elected by the judiciary (eight judges, one lawyer, six members of parliament; see section 46 of the State law on judges and prosecutors), but is only competent to decide if the minister of justice and the *Präsidialrat* (*supra* A.III.) do not come to terms with the appointment or promotion of an individual judge (section 43 para. 6 of the aforementioned State law).[38]

The German experience with the *Richterwahlausschüsse* is mixed at best. First, the judicial review of their findings is difficult as they combine the principle of merit selection with the element of a political election.[39] Second, the committees tend to increase the influence of party politics on the selection process. According to scholarly findings as well as practitioners' reports, the judicial members do not act as an antidote, but tend to participate in these "joint solutions" by forming *de facto*-coalitions of judges' associations and political parties.[40]

VIII. Executive Judges

Perhaps the most important mechanism of judicial self-government in Germany is the simple fact that court administration is basically carried out by judges. The powerful presidents of the courts (especially the higher regional courts) are judges, and a closer look at the ministries of justice will expose that most of the responsible officers are either deputized judges (in most states) or civil servants that frequently exchange between the judicial and the executive office (so-called Bavarian model). It can now be argued that all these officers may be judges (or at least part-time judges) by training, but do not act under the cover of judicial independence in their administrative office. That is technically correct – the president of a court acts under the supervision of a higher president or the ministry of justice when he does not actually act as a judge.[41] Nevertheless, the objection misses the reality of present-day German court administration. Basically, both the German

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[38] *See* Wittreck, *supra* note 3, at 400; A. TSCHENTSCHER, DEMOKRATISCHE LEGITIMATION DER DRITTEN GEWALT 361 (2006).

[39] *See Bundesverfassungsgericht* [Federal Constitutional Court], 143 BVERFGE 22; K. F. Gärditz, *Anmerkung zum Beschluss des Zweiten Senats des BVerfG vom 20.9.2016 – 2 BvR 2453/15,* NEUE JURISTISCHE WOCHENSCHRIFT 3429 (2016); M. Sachs, *Bedeutung der Bestenauslese nach Art. 33 II GG für die Richterwahl nach Art. 95 II GG,* JURISTISCHE SCHULUNG 89 (2017).

[40] *See* I. Hurlin, *Wer wird RichterIn [sic] in Schleswig-Holstein?, in* MITWIRKUNG – MITBESTIMMUNG 49, 50 (Neue Richtervereinigung ed., 1992); U. Vultejus, *Der Zugang zum Richterberuf, in* ARBEIT UND RECHT 251, 254 (1995). In Hessen, Social Democrats proposed a reform of the *Richterwahlausschuss* alluding to the fact that the members belonging to the judiciary were deemed conservative and close to the rival Christian Democrats; the judges were simple coined "political opponents": T. Rasehorn, *Der Richterwahlausschuß als gesellschaftspolitisches Problem der Justiz, in* LIBER AMICORUM RUDOLF WASSERMANN, 401, 410 (C. Broda et al. eds., 1985); Wittreck, *supra* note 21, at 146-7.

[41] *See* Schulze-Fielitz, *supra* note 18, at note 32; *cf.* Seibert-Fohr, *supra* note 3, at 455 et seq.

judiciary and the German court administration are "closed shops" managed by officials raised and socialized as judges. As this socialization (which starts at a very young age; see *infra* B.I.) takes accurate aim at closemouthed and highly assimilated judges, even those who rise through the ranks to the position of president or for some time change to the executive bench will act with a high degree of consideration of the interests and opinions of their "peers". On the other hand, the head of a ministry of justice has only limited control over the day-to-day work of the judiciary or even the distinct mechanisms of promotion. The ministry may appoint the higher-ranking judges (and will do so with due regard to party affiliation), but is simply unable to reach the rank and file of the judiciary.

Perhaps the most significant example is the judicial appointment process in the state of Nordrhein-Westfalen (with almost 18 million inhabitants, it is the most populous German *Land*).[42] According to the state constitution (Article 58 para. 1), the officials (including judges without mentioning them explicitly) are appointed by the State government as a corporate body. As detailed in Article 58 para. 2, this power may be delegated. This has been done; for many years, the responsibility to appoint judges rested with the ministry of justice. In recent years, it has been sub-delegated to the presidents of the higher regional courts (*Oberlandesgerichte*) and the presidents of the higher specialized courts (e.g. the *Oberverwaltungsgericht*).[43] As a matter of fact, new judges are simply selected by a panel of sitting judges (based on the results of a one-day assessment center). Basically, this is the much-dreaded cooptation.

B. Impact of Judicial Self-Government on Core Values

Once again, one has to underline that in Germany "judicial self-government" may only be read as "elements of judicial self-government" and has to be analyzed with the competing/conflicting powers of the executive court administration in mind. Thus, the evaluation of the impact on the pre-selected "core values" will have to be double-tracked, starting with judicial independence (I.). Accountability (II.), legitimacy (III.), transparency (IV.), and confidence (V.) will follow suit.

I. Independence

Elements of self-government as such do not promote (or endanger) judicial independence.[44] The ability of a judge to infringe on the independence of another judge

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[42] *See* P. J. Tettinger, *Artikel 58, in* KOMMENTAR ZUR VERFASSUNG DES LANDES NORDRHEIN-WESTFALEN (W. Löwer & P. J. Tettinger eds., 2002), notes 9 and 16.

[43] *See* G. Debusmann, *Drum prüfe, wer sich ewig bindet: Einstellungsverfahren für junge Richter im Bezirk des OLG Hamm,* DEUTSCHE RICHTERZEITUNG 263 (2003).

[44] *See* Wittreck, *supra* note 21, at 156.

does not depend on the dependence or independence of the infringing judge: German presidia (elected by fellow judges and acting under the guarantee of independence, see *supra* A.I.) have in some cases infringed on the rights of individual judges[45] as well as judges acting as court presidents (appointed by the ministry of justice and acting dependently, see *supra* A.VIII.).[46] The mechanisms of self-government merely shift the dangers for individual judicial independence by shifting power. Thus, an analysis of the impact of judicial self-government on judicial independence has to scrutinize the sources of menaces for judicial independence.

In Germany, these threats do not originate from "politics" or the political level of parliament and executive.[47] Cases of politicians (especially ministers of justice) trying to influence individual judges or proceedings are extremely rare and turn out to be highly dissuasive: All offenders invariably lost their office.[48] The crucial or focal point is the advancement process.[49] As long as any selection takes place, those exerting the power to select may induce those undergoing scrutiny to ask whether some kind of professional behavior would be more or less "helpful" in the eyes of the powerful (e.g. becoming member of the same political party or judges' association …). As the *Richterwahlausschüsse* amply demonstrate *(supra* A.VII.), elements of self-government are no safeguard against this risk. The radical solution would be the abolishment of the advancement system or the judicial hierarchy respectively (see *infra* C.II.). Otherwise, the service courts act as a (mostly) effective guardian of individual judicial independence in the event of an infringement (see *supra* A.IV.).

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[45] *See Bundesverfassungsgericht* [Federal Constitutional Court], 17 BVERFGE 252, 262; *Bundesverfassungsgericht* [Federal Constitutional Court], 3rd Chamber of the Second Senate, DEUTSCHE RICHTERZEITUNG 100 (1991); *Bundesverwaltungsgericht* [Federal Administrative Court], 50 BVERWGE 11, 13 et seq.; 67 BVERWGE 222, 225; *Bundesgerichtshof* [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT 425 (1991); *Dienstgerichtshof* [Regional Service Court] Frankfurt a. M., DER ÖFFENTLICHE DIENST 220 (1988); *Verwaltungsgericht* [Administrative Court] Frankfurt a. M., ZEITSCHRIFT FÜR LANDES- UND KOMMUNALRECHT HESSEN, RHEINLAND-PFALZ UND SAARLAND (LKRZ) 378 (2014). *See* Wittreck, *supra* note 3, at 185, 357-8.

[46] *See* Wittreck, *supra* note 3, at 183 et seq.; Schulze-Fielitz, *supra* note 18, at notes 41 et seq. (each with further references to case law); *see* also Seibert-Fohr, *supra* note 3, at 505-6.

[47] *See* P. Schlosser & W. Habscheid, *Federal Republic of Germany, in* JUDICIAL INDEPENDENCE. THE CONTEMPORARY DEBATE 78 (S. Shetreet & J. Deschênes eds., 1985); Y. WANG, THE INDEPENDENCE OF JUDGES IN CHINA AND GERMANY 110, 129 et seq., 174 et seq. (2011); Seibert-Fohr, *supra note* 3, at 447.

[48] Last example: The minister of justice of the eastern state of Saxony (himself a former judge and president of the *Richterbund*) had to resign after using his official mail account to ask a court in another German state after the further duration of a private lawsuit filed by the minister.

[49] *See* Wang, *supra* note 47, at 180 et seq.; Seibert-Fohr, *supra* note 3, at 473 et seq. Cf. L. Jünemann, *Richterliche Unabhängigkeit und Leistungsbeurteilung – Ein Beitrag aus deutscher Sicht, in* RICHTERLICHE UNABHÄNGIGKEIT UND LEISTUNGSBEURTEILUNG 55 (T. Stadelmann, S. Gass & R. McCombe eds., 2015).

II. Accountability

The "value" of accountability as such is basically alien to German law.[50] The term *Verantwortung* (lit. responsibility) may come close to the concept.[51] In German literature on court administration, it typically appears as some kind of sub-element of democratic legitimacy/legitimization (see the next point).[52]

As we have seen, German judges may be held responsible for shortcomings or demerits only by the vote of their peers or fellow judges (see above for the service, penal and civil courts; A.IV.–VI.). This provides strong protection and ensures that only those judges will be held liable who have overtly and seriously transgressed borders being considered indispensable by their fellow judges. Having this in mind, one may conclude that the accountability of the German judiciary is generally low due to elements of self-government. But such conclusion would suppress a powerful mechanism of *informal* control: It may be coined the power of numbers. The court administration has access to the "Erledigungszahlen" (lit. accomplishment data) of any judge and will invariably base the personnel review or evaluation on these numbers.[53] As a rule of thumb, the vast majority of German judges simply accept this as some kind of fact and act accordingly, thus developing a culture of compliance according to numbers (see once again the case of the below-the-average-judge *supra* A.IV.).

III. Legitimacy

If one equates "legitimacy" with the German concept of democratic legitimization (*infra* D.II.), the German judiciary as a whole does not pose serious problem of legitimacy.[54] The Third power as such and at least the Federal courts are explicitly acknowledged by the constitution (Article 92, 93, and 95 para. 1 Basic Law); the same applies to their independence (Article 97 Basic Law; so-called *institutional* legitimization). The judges are either appointed by the ministries of justice (or deputies of these) or the *Richterwahlausschüsse* (*supra* A.VII.). Both organs are responsible to the parliament elected by the sovereign people (*personal* legitimization). Finally, the judges are bound to

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[50] But *see* D. S. Clark, *The Selection and Accountability of Judges in West Germany. Implementation of a Rechtsstaat,* 61 SOUTH. CAL. L. REV. 1795, 1832 (1988).

[51] *See* H. Dreier, *Verantwortung im demokratischen Verfassungsstaat, in* VERANTWORTUNG IN RECHT UND MORAL 9 (U. Neumann et al. eds., 2000); D. Ehlers, *Verantwortung im öffentlichen Recht,* 46 DIE VERWALTUNG 467 (2013).

[52] *See* Wittreck, *supra* note 3, at 140 et seq.; Seibert-Fohr, *supra* note 3, at 484 et seq.

[53] *See* J. Riedel, *Individual Evaluation of Judges in Germany,* 4 ONATI SOCIO-LEGAL SERIES 974 (2014).

[54] *See* A. Voßkuhle & G. Sydow, *Die demokratische Legitimation des Richters,* JURISTENZEITUNG 673 (2002); A. TSCHENTSCHER, DEMOKRATISCHE LEGITIMATION DER DRITTEN GEWALT (2006); Wittreck, *supra* note 3, at 114 et seq.; Minkner, *supra* note 3, at 48 et seq.

the laws enacted by parliament (Article 20 para. 3, Article 97 para. 1 Basic Law; *material* legitimization). The last thread of legitimization is weakened to some degree, as the power of supervision is limited due to judicial independence.[55]

What is the effect of the abovementioned mechanisms? The independence of the presidia as well as the "blind allocation" must be seen as strengthening factors (A.I.). The participation mechanisms of the *Richterräte* and *Präsidialräte* are technically impairments, but rather weak ones (A.II. and A.III.). The record of the service courts is mixed at best, as they may tend to serve interests of the judiciary as an in-group (A.IV.). The same is true for the criminal and civil courts if fellow judges are concerned (A.V. and A.VI.). The *Richterwahlausschüsse* were intended as bulwarks of democratic legitimacy, but practically ended up as instruments of party politicization (A.VII.). Finally, the involvement of executive judges is janiform at best (A.VIII.): As they know the judiciary from within, they can be effective administrators. On the other hand, their socialization as judges may lead to reluctance to address troublesome developments.

IV. Transparency

The German judiciary and transparency are not connected by a close friendship – to put it mildly.[56] A recent case may underline the dilemma. An attorney sued to get access to the direct dial numbers of a court under the Freedom of Information Act. He lost the case because the Higher Administrative Court of North Rine-Westphalia came to the conclusion that this direct access to the single judge would impair the functioning of the court.[57] The judgment is quite typical of how the German judicature deals with the public. While courts routinely maintain websites and appoint judges as press relations officers, they still tend to misunderstand, or at least to underestimate, the necessity to "translate" their language as well as their specific world view.

At the same time, the aforementioned mechanisms of self-government have only a marginal effect on the (lacking) transparency of the judiciary. To put it plainly, all of them are simply too technical to be understood by the broad public. Just two examples: German courts typically publish the "Geschäftsverteilungsplan" (lit. roster of the allocation of duties) enacted by the presidia *(supra* A.I.) on their homepage, but do not try to make clear that it has been concluded under the guarantee of judicial independence. The case of the

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[55] *See* H. Dreier, *Artikel 20 (Demokratie), in* 2 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2015), note 140.

[56] German reading: Wittreck, *supra* note 3, at 163 et seq.; C. v. COELLN, ZUR MEDIENÖFFENTLICHKEIT DER DRITTEN GEWALT (2005); C. VISMANN, MEDIEN DER RECHTSPRECHUNG (2011). *See* M. Wolf, *The Press and the Courts in Germany, in*: JUDICIAL INDEPENDENCE. THE CONTEMPORARY DEBATE 117 (S. Shetreet & J. Deschênes eds., 1985).

[57] *Oberverwaltungsgericht* [Higher Administrative Court] Münster, DEUTSCHES VERWALTUNGSBLATT 1133 (2015); short remark on this judgment by J. M. Schmittmann, ZEITSCHRIFT FÜR DATENSCHUTZ 392 (2015).

below-the-average-judge *(supra* A.IV.) has been covered mainly in professional and local journals, but did not reach national headlines.

V. Confidence

According to recent surveys, the trust of the German public or society in the judiciary is generally quite high.[58] This is especially true for the Federal Constitutional Court, who ranks among the most trusted institutions in Germany.[59] On closer inspection, the amiable picture gets some dark stains or blots: According to a recent Bavarian survey, those citizens who had contact with the judicial system had less confidence than those who lacked this real experience.[60]

Once again: To which extent do the mechanisms of self-government influence the confidence or trust of the public in the German judiciary? The answer is quite obvious: As they are not known by or to the public, their impact is rather limited. There are indeed cases that disturb the confidence of the German public, but these are cases of malfunction of the dispensation and not the administration of justice. One recent case may act as an example: Bavarian courts condemned members of a farmers' family (all were mentally handicapped) to prison sentences for murdering the farmer and feeding his body to the pigs. Years later, the corpse of the farmer was found in a nearby river – certainly not eaten. Nevertheless, in the revision of the trial another court upheld the conviction – only to be corrected by the Federal Supreme Court.[61]

C. Proponents of Judicial Self-Government

In Germany, judicial self-government is basically a project of the organized judiciary (I. and II.). Jurisprudence (III.) and politics (IV.) in contrast are reluctant at least.

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[58] *See* R. Köcher, *Im Namen des Volkes,* FRANKFURTER ALLGEMEINE ZEITUNG 8 (Aug. 28, 2014): 66% of those interviewed have trust in the courts. More recent data: https://de.statista.com/statistik/daten/studie/153813/umfrage/allgemeines-vertrauen-in-die-justiz-und-das-rechtssystem/ (22.7.2018); *see* also the older study of R. Kniffka, *Das Ansehen der Justiz in der Öffentlichkeit,* 2 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 225 (1981).

[59] *See* https://de.statista.com/statistik/daten/studie/176867/umfrage/vertrauen-in-das-bundesverfassungsgericht/ (22.7.2018); cf. HERZKAMMERN DER REPUBLIK. DIE DEUTSCHEN UND DAS BUNDESVERFASSUNGSGERICHT (M. Stolleis ed., 2011).

[60] Still not published.

[61] *See* T. DARNSTÄDT, DER RICHTER UND SEIN OPFER 94 et seq. (2013); H. Bubrowski, *Die Leiche war doch nicht zerstückelt,* FRANKFURTER ALLGEMEINE ZEITUNG 8 (June 28, 2014).

I. German Association of Judges (Deutscher Richterbund)

The traditional German Association of Judges unites 16.000 of the roundabout 25.000 members of the German judiciary (comprising judges as well as prosecutors).[62] Although typically aligned with the Christian Democrats of the CDU/CSU (who more than once chose secretaries of justice out of the higher ranks of the association), the *Richterbund* has decided to propose a two-pillar-model of judicial self-government some years ago.[63] It stipulates two bodies of self-government: On one hand, a judicial selection committee ("Justizwahlausschuss") is composed of a majority of members elected by the *Land* parliament (nine MPs and its President) and a minority of judges elected by their peers (also nine); it is responsible only for the selection of members of the second body, the judicial administrative council ("Justizverwaltungsrat"), consisting of a president of the judiciary ("Justizpräsident") and four more members. It will completely replace the old-fashioned ministry of justice (which is basically reduced to the administration of prisons) and shall be responsible for the appointment, promotion, and discipline of judges. It may be recalled by the *Justizwahlausschuss*, which is itself answerable to the parliament (which may remove members with a supermajority of two thirds of its members).

II. New Association of Judges (Neue Richtervereinigung)

The leftist "New Association of Judges" is much smaller than the *Richterbund*, comprising about 550 members. Nevertheless (or consequently), it has proposed a much more radical model of self-government.[64] The main difference is the abandonment of any system of advancement: While the *Richterbund* plans to leave the judiciary basically unchanged by simply exchanging the ministries of justice for new structures of self-government (see *supra* C.I.), the *Richtervereinigung* aims at a much more radical reform. After its implementation, all German judges would be just (equal) "judges", regardless of the court they are sitting in. Moreover, any position as court president would only be transferred for a limited time (with the incumbent stepping back into the rank and file after his or her term). The association hopes to be able to remove any dangers for judicial independence

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[62] *See* S. M. BOYNE, THE GERMAN PROSECUTION SERVICE. GUARDIANS OF THE LAW? (2014).

[63] *See* Frank, *supra* note 1, at 97 et seq. (the author was chairman of the *Richterbund* at the time of the publication). German material: http://www.drb.de/cms/index.php?id=552; there also the pdf of the draft of a "Landesgesetz zur Selbstverwaltung der Justiz (Landesjustizselbstverwaltungsgesetz – LJSvG)". Compare C. Frank, *Selbstverwaltung der Justiz: Ein Modell auch für Deutschland,* 91 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 405 (2008); H. Weber-Grellet, *Selbstverwaltung der Justiz – Zwei-Säulen-Modell des Deutschen Richterbundes,* ZEITSCHRIFT FÜR RECHTSPOLITIK 153 (2007); H. Weber-Grellet, *Weitere Schritte auf dem Weg zur Selbstverwaltung der Justiz,* DEUTSCHE RICHTERZEITUNG 2, 46 et seq. (2012); Seibert-Fohr, *supra* note 3, at 461 et seq.

[64] *See* M. CEBULLA & W. K. KANNENBERG, SELBSTVERWALTUNG DER JUDIKATIVE. DIE GESETZENTWÜRFE DER NEUEN RICHTERVEREINIGUNG (2012); English reading: H. Haeuser, *Self-governance within the Courts: vertical versus horizontal, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 103 (P.-A. Albrecht & J. Thomas eds., 2009).

through this move (the *rationale* is that even in a system of self-government, a junior judge can speculate about the worldview of those senior judges responsible for deciding on his promotion – the system of self-government will just replace the potentially dangerous decision-makers by other potentially dangerous decision-makers).

Bearing this in mind, the New Association of Judges stipulates for the following model of judicial self-government (it would be applicable for the Federal as well as the State level): A judicial selection committee ("Richterwahlausschuss") consisting of a two-third-majority of members elected by parliament and a minority elected by members of the judiciary and the Bar Association shall be responsible for the appointment of judges. A judicial administrative council ("Justizverwaltungsrat") consisting of 20 members elected by their peers from the judiciary and ten members elected by parliament will basically replace the ministry of justice in all day-to-day-affairs of the judiciary. Moreover, the powers of the presidia (*supra* A.I.) shall be upgraded.

It has to be pointed out that, in particular, according to the traditional German understanding of democracy, the Justizverwaltungsrat is quite clearly unconstitutional (see *infra* D.II.).[65] The members elected by their fellow judges and prosecutors are not able to trace back their *administrative* mandate to the German people (their *judicial* mandate is another matter).

III. Jurisprudence

In German legal academia, the demand for judicial self-government is weak at least.[66] Basically, the judiciary or questions of court administration in particular are addressed only by a couple of scholars at all. Amongst these, only a tiny minority act as advocates of judicial self-government.[67] One has to add a couple of practitioners.[68] One reason may be the rather rigid subdivision of German jurisprudence into Civil and Public law: While the constitutional rules on judicial independence (Article 97 of the Basic Law) are typically

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[65] *See* Minkner, *supra* note 3, at 267, 275; *Wittreck, supra* note 21, at 155-6.

[66] *See* Wittreck, *supra* note 3, at 642 et seq., 655 et seq.; Wittreck, *supra* note 21, at 152 et seq. (with further German readings).

[67] *See* namely T. Groß, *German constitutional Expectations, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 38 (P.-A. Albrecht & J. Thomas eds., 2009) (*Groß* is a Public Law teacher from Osnabrück); P.-A. Albrecht, *Safety mechanisms for the autonomy and independence of the judiciary. Insights from the third power in Europe in discussion between the CCJE-Working-Group and the German Commission "Judicial System" in Berlin (June 23rd 2014),* 97 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 420 (2014) (*Albrecht* held a chair for criminology at Frankfurt a. M.).

[68] *See* H.-E. Boettcher, *Away from Napoleonic and Wilhelminian Models, to a democratic Organisation of the Courts in Germany, in* STRENGTHEN THE JUDICIARY'S INDEPENDENCE IN EUROPE 111 (P.-A. Albrecht & J. Thomas eds., 2009); or Weber-Grellet, *Weitere Schritte*, *supra* note 63, at 2 et seq., 46 et seq.

covered by public law teachers, the statutory legislation on court administration is mainly dealt with by judges and other practitioners with a Civil (or Criminal) law background. Practically, these are separate discourses.

IV. Politics

As far as can be seen, the chance of judicial self-government being discussed in German politics is void. There have been two attempts to put it into action. On the state level, the short-lived coalition of the Green Party and the Christian Democrats in Hamburg aired a proposal in 2008,[69] which disappeared alongside with the coalition. On the federal level, the leftist party "Die Linke" basically adopted the proposal of the "Neue Richtervereinigung" (*supra* C.II.) in the penultimate legislation period; the motion foundered in the legal committee of the *Bundestag*.[70]

D. Impediments to Judicial Self-Government

If there are institutions of self-government and associations fighting for this model, why has Germany refrained of any step in the direction of the Italian model until now? There are (at least) three important obstacles, one of them factual, the other two legal: Germany has a long tradition of recruiting judges who are not inclined to take their professional lives into their own hands (I.), and the prevailing understanding of the democratic principle effectively acts as a ban on judicial self-government models comprising bodies with a majority of judges (II.). The weak interpretation of the concept of the separation of powers does not act as a potential counter-weight (III.).

I. Recruitment Patterns of the German Judiciary

Generally, Germany has a typical career judiciary of the continental type.[71] The study of law and its curriculum are regulated in the German Judiciary Act; in fact, German law

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[69] *See Reformpläne in Schleswig-Holstein und Hamburg,* 95 BETRIFFT JUSTIZ 330 (2008); drawing near (senator of justice) T. Steffen, *Autonomie für die Dritte Gewalt – Erwartungen aus der Politik,* 91 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 354 (2008); *see* G. Mackenroth, *Selbstverwaltung der Justiz – Zwischenbilanz in Frageform,* DEUTSCHE RICHTERZEITUNG 79, 81 et seq. (2009).

[70] Entwurf eines … Gesetzes zur Änderung des Grundgesetzes – Herstellung der institutionellen Unabhängigkeit der Justiz, BT-Drs. 17/11701; Entwurf eines Gesetzes zur Herstellung der institutionellen Unabhängigkeit der Justiz, BT-Drs. 17/11703 ("BT-Drs." stands for printed matters of the German parliament [Bundestag]); *see* the expert votes: http://www.bundestag.de/bundestag/ausschuesse18/a06/anhoerungen/Archiv; *see* also E. Kreth, *Steter Tropfen höhlt den Stein,* DEUTSCHE RICHTERZEITUNG 236 (2013).

[71] *See* Clark, *supra* note 50, at 1802 et seq., 1816 et seq.; M. Gressmann, *Germany, in* PROCESS OF THE APPOINTMENT AND TRAINING OF JUDGES 153 (International Association of Judges ed., 1999); J. Riedel, *Recruitment, Professional Evolution, and Career of Judges and Prosecutors in Germany, in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS AND SPAIN 69 (G. Di Federico ed.,

students do not study to become "lawyers", but to attain the "qualification to act as judges". This requires a four-year university study (terminated by a first state examination) and a two-year internship or *Referendariat* (terminated by a second state examination).[72] As a rule of thumb, judges and prosecutors are recruited directly from the best ten percent of the graduates of this second state examination. The recruitment of older applicants or of lawyers with some job experience is not prohibited by law, but highly unusual. Basically, German judges thus enter the judiciary quite young. Furthermore, as scholars of legal sociology have pointed out, those students of the law applying for the status of judge or prosecutor are of a typical mold:[73] As they could earn much more in a law firm (the more prestigious ones try to recruit from the same pool of the best ten percent), they strive for the security of a public service position which is basically free of any administrative responsibilities. In fact, German judges have bitterly opposed the transfer of disciplinary responsibility for the so-called "service units" (i.e. court typists or clerks) from special management officers to themselves.[74] Having this in mind, even those judges who propose judicial self-government tacitly concede that the German judiciary has recruited judges who are not suitable for or at least not fond of the job of self-government.[75]

II. Distinct German Appreciation of the Democratic Principle

While this is a factual obstacle, the most powerful argument is the distinct German understanding of democracy as a principle of Public Law. Though every European lawyer would probably admit that democracy should mean some kind of influence of the people on the exercise of power,[76] German jurisprudence and judicature have developed a highly formalistic model of democratic legitimacy.[77] It was basically invented to confine employee participation in the public service or to curb the power of the public service unions.

2005); J. Riedel, *Training and Recruitment of Judges in Germany,* 5 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 42 (2013).

[72] *See* S. Korioth, *Legal Education in Germany Today,* 24 WISCONSIN INT'L. L. J. 85 (2006); *see* also the contributions in LEGAL EDUCATION AND JUDICIAL TRAINING IN EUROPE (D. Piana et al. eds., 2013).

[73] *See* E. Lange & N. Luhmann, *Juristen – Berufswahl und Karrieren,* 65 VERWALTUNGSARCHIV 113 (1974).

[74] *See* the highly sceptical view of W. Viefhues & K.-H. Volesky, *Neue Konzepte zur Gerichts- und Arbeitsorganisation in Verbindung mit dem Einsatz moderner Informationstechnik in der ordentlichen Gerichtsbarkeit,* DEUTSCHE RICHTERZEITUNG 13, 19 (1996); and Wittreck, *supra* note 3, at 477-8.

[75] Wittreck, *supra* note 21, at 157; Minkner, *supra* note 3, at 660-1.

[76] *See* D. Zacharias, *Terminologie und Begrifflichkeit, in* 2 HANDBUCH IUS PUBLICUM EUROPAEUM § 40 (A. v. Bogdandy, P. Cruz Villalón & P. M. Huber eds., 2008), notes 14 et seq.

[77] *See* Robbers, *supra* note 23, at notes 144 et seq. German reading: Wittreck, *supra* note 3, at 114 et seq.; Dreier, *supra* note 55, at notes 109 et seq.; Minkner, *supra* note 3, at 48 et seq.

This model distinguishes three modes of democratic legitimation: While the *institutional* or functional legitimation is guaranteed if an institution or state function is mentioned in the constitution (e.g. Article 92 of the Basic Law mentions the judiciary as such), the *personal* legitimation is established by an unbroken chain of acts of appointment linked to parliament: The German people elect the members of the *Bundestag*, the *Bundestag* elects the Chancellor, the Chancellor appoints the Federal ministers, and the ministers appoint the civil servants of their department. Lastly, the *material* legitimation is secured by the commitment to the law and the accompanying supervision of the civil servants. This sounds quite innocent, but has dire consequences for the judicial self-government. Contrariwise, the model excludes any significant influence from groups that are unable to trace back their legitimation to parliament (or the people as a whole). According to the predominant German understanding, an institution with a majority of members without adequate personal legitimation is unconstitutional as it contravenes the democracy principle. This clearly excludes any judicial council with a majority of its members elected by members of the judiciary, as the CCJE has proposed in a couple of documents.[78] Furthermore, this should make clear why the German proposals are rather closemouthed and tentative – the associations know the model all too well …

III. Distinct German Appreciation of the Separation of Powers

Now one might ask whether this model stands alone or could be counter-balanced by the notion or idea of the separation of powers.[79] This is, of course, known in Germany and enshrined in the *Grundgesetz* (Article 1 sec. 3, Article 20 sec. 2 and 3 Basic Law). According to the dominant interpretation, this should not be misunderstood as a strict separation. The typical explanation goes as follows: The German constitution stipulates for a system of mutual control of the different powers (commonly called interdigitating or interlacing of powers, German "Gewaltenverschränkung"). According to this understanding, the Federal Constitutional Court or *Bundesverfassungsgericht* is able to exercise control vis-a-vis the *Bundestag* by rejecting laws as unconstitutional, while the parliament is able to exercise control in the other direction by selecting the judges of the court or changing the legal frame of the institution. And the traditional power of the executive to appoint and promote judges acts as a counterbalance to the judicial review conducted by these judges. Therefore, the notion of an institutional independence of the Third Power that has to be safeguarded against parliament and the executive is practically unknown and cannot at least act as an argument to free the judiciary from the chains of democratic legitimation (which as a matter of fact proves to be the stronger principle).

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[78] *See* STANDARDS ON JUDICIAL INDEPENDENCE 279 et seq. (S. Gass, R. Kiener & T. Stadelmann eds., 2012); sceptical J. Terhechte, *Judicial Ethics for a Global Judiciary – How Judicial Networks Create their own Codes of Conduct,* 10 GER. L. J. 501 (2009); and Wittreck, *supra* note 3, at 222 et seq.

[79] *See* C. MÖLLERS, THE THREE BRANCHES. A COMPARATIVE MODEL OF THE SEPARATION OF POWERS (2015); *see* also A. W. HERINGA & P. KIIVER, CONSTITUTIONS COMPARED 22 et seq. (3rd ed. 2012).

E. Conclusion: German Resistance to Judicial Self-Government and the "Eternity Clause" of the Basic Law

Are these results set in stone? The answer may be a tentative "yes". According to Article 79 para. 3 of the Basic Law (the so-called eternity clause), constitutional amendments are ruled out that would "touch" the fundamental principles of Article 20 of the German Constitution.[80] Although the Federal Constitutional Court has not explicitly determined that any alteration of the model of democratic legitimization is prohibited,[81] it has underlined its immediate derivation from the principle of democracy enshrined in Article 20 paras. 1 and 2 of the Basic Law. An amendment of the *Grundgesetz* which according to the Italian or CCJE model seeks a full-fledged institutional independence of the third power would thus be at least a hazard.[82]

[80] *See* K. Hailbronner & M. Kau, *Constitutional Law, in* AN INTRODUCTION TO GERMAN LAW 53, 81 (M. Reimann & J. Zekoll eds., 2nd ed. 2005); R. Dixon, *Constitutional amendment rules: a comparative perspective, in* COMPARATIVE CONSTITUTIONAL LAW 96, 104 (T. Ginsburg & R. Dixon eds., 2011). Best German coverage: H. Dreier, *Article 79 III, in* 2 GRUNDGESETZ-KOMMENTAR (H. Dreier ed., 3rd ed. 2015), notes 14 et seq.

[81] Leading cases: *Bundesverfassungsgericht* [Federal Constitutional Court] 93 BVERFGE 37; 107 BVERFGE 59.

[82] There is consensus that the requirement of democratic legitimization as such is "änderungsfest" (lit. amendment-proof), while many constitutional lawyers point out that the details of the model may be altered. *See* only Dreier, *supra* note 80, at note 37; K.-E. Hain, *Article 79, in* 2 V. MANGOLDT/KLEIN/STARCK, KOMMENTAR ZUM GRUNDGESETZ (P. M. Huber & A. Voßkuhle eds., 7th ed. 2018), notes 83-4.

Articles

Judicial Self-Government in Czechia: Europe's Black Sheep?

By Adam Blisa,[*] Tereza Papoušková[**] & Marína Urbániková[***]

Abstract

This paper maps judicial self-government in Czechia and argues that although Czechia is sometimes perceived as a black sheep of Europe for not introducing any form of judicial council into its judicial system, there is in fact a substantial amount of judicial self-government exercised by several bodies, the most important being the court presidents, and it is therefore a mistake to conflate judicial self-government with judicial councils. The most notable changes to judicial self-government are then introduced and their impact on values crucial for the functioning of the judiciary assessed. And, as the judicial self-government in Czechia is primarily exercised by court presidents, the narrative of changes to judicial self-government and their impact is presented as a narrative of changes affecting court presidents and of their effects on the wider legal, social and political fields. The dominance of court presidents, built in part on informal powers, is a mixed blessing however, as it can have both positive and negative impact on the crucial values and may prove rather fragile in the future.

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At first sight, Czechia does not differ from most European countries as far as the organization of justice is concerned. Its judicial system consists of the Constitutional Court and the 'ordinary' court system, which is comprised of the Supreme Court (SC), the Supreme Administrative Court (SAC), high courts, regional courts and district courts. Apart from the top two courts and the district courts, all the ordinary courts decide on criminal,[1] civil and administrative matters. However, there is something that makes Czechia special – unlike many of its European counterparts, Czechia has never had a judicial council, i.e. a body that centralizes the administration of courts in the hands of judges. In this sense Czechia, when it comes to judicial self-government (JSG), is the proverbial "black sheep".[2] During the 1990's and 2000's, when many of the candidate-countries for accession to the European Union adopted the Euro-model of judicial council, Czechia resisted and retained its Ministry of Justice model with roots in the Austro-Hungarian Empire.[3]

Even though there is no judicial council as yet and many hold the opinion that its introduction is long overdue, it cannot be said that there is no JSG in Czechia. In fact, quite the contrary is true.[4] Two crucial actors stand at the center of the Ministry of Justice model, in whose hands lie most of the personal, administrative and financial affairs of the judiciary: the Ministry of Justice (MoJ) and the court presidents (CPs).[5] Several other actors complement them. They are the President of the Czech Republic, who formally appoints judges and CPs (and in the past also attempted to dismiss them), disciplinary panels (the only body with the power to dismiss judges), judicial boards functioning as a consultative body at each court, and the Judicial Academy, responsible for educating present and future judges.[6] It is thus clear that actors from within the judiciary play a rather important role in the matters of judicial government (see Table 1 below).

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[1] Note that prosecutors do not form a part of the Czech judiciary but are independent from it.

[2] *See* David Kosař, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice,* 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 13, 97 (2017).

[3] Michal Bobek, *The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance*, 16 EUR. PUB. L. 251 (2010); and, generally, Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN L.J. 1257 (2014).

[4] We define a JSG body as a body with at least one judge whose primary function, entrenched in a legal norm, is to decide about issues regarding court administration and/or the career of a judge, and/or advise those who decide about such issues.

[5] DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 176 (2016).

[6] For further information regarding the Czech judicial environment and its actors *see* especially Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries,* 14 EUR. PUB. L. 99 (2008); Bobek, *supra* note 3; KOSAŘ, *supra* note 5; Zdeněk Kühn, *The Democratization and Modernization of Post-Communist Judiciaries, in* CENTRAL AND EASTERN EUROPE AFTER TRANSITION 177 (Alberto Febbrajo & Wojciech Sadurski eds., 2010); ZDENĚK KÜHN, THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION? (2011); Zdeněk Kühn, *Judicial Administration Reforms in Central-Eastern Europe: Lessons to be*

The aim of this article is to provide complex insight into the functioning of JSG in Czechia and an overview of its effects on the wider legal, social and political fields. We claim that the case of Czechia proves it is a mistake to conflate JSG only with judicial councils, and that JSG can exist without them. In Czechia, it was the CPs who built and preserved a great deal of JSG, but, at the price of a lack of transparency and fragility of the balance between all actors involved. Section A thus provides an overview of the actors and a historical context of their evolution; Section B tracks the impact of changes in JSG on values that are critical for the functioning of the judiciary, namely judicial independence, accountability, transparency, public confidence and legitimacy; and Section C assesses the influence the JSG had on the separation of powers and the democratic principle. Section D then briefly concludes.

Table 1: Bodies and actors of judicial government and self-government in Czechia

<table>
<tr><th colspan="2">Judicial Self-Government</th><th>Judicial Government</th></tr>
<tr><td rowspan="2">Court presidents</td><td>College of presidents of regional courts</td><td rowspan="3">Minister of Justice</td></tr>
<tr><td>Trinity of top court presidents</td></tr>
<tr><td colspan="2">Judicial boards</td></tr>
<tr><td colspan="2">Judicial Academy</td><td rowspan="2">President of the Czech Republic</td></tr>
<tr><td colspan="2">Disciplinary panels</td></tr>
</table>

A. Of Court Presidents… and Others: Forms and Rationales of Judicial Self-Government

This section maps the key JSG bodies in Czechia; their powers, composition and functioning are discussed in the first part. The following part then traces, where relevant, rationales behind the introduction of those bodies and key changes made to them (i.e. critical junctures in their development). The overall picture is that even though there are several JSG bodies, the primary role is played by the CPs, and the narrative of changes to JSG is predominantly a narrative of changes in CP powers or attempts to take powers away from CPs.

Learned, in JUDICIAL INDEPENDENCE IN TRANSITION 613 (Anja Seibert-Fohr ed., 2012); and HLEDÁNÍ OPTIMÁLNÍHO MODELU SPRÁVY SOUDNICTVÍ PRO ČESKOU REPUBLIKU (Jan Kysela ed., 2008).

I. Overview of Judicial Self-Government Bodies

Court presidents are arguably the most important and powerful JSG actors inside and outside the judiciary in Czechia.[7] Firstly, they are key players in personal JSG, as they play a significant role in the careers of judges from beginning to end and have a say in judges' appointments, secondments, reassignments and promotions[8] and hold the power to file a disciplinary motion.[9] More specifically, the consent of[10] or consultation with[11] CPs is de jure needed for the appointment of a judge to "their" courts.[12] Nonetheless, due to the lack of formal legal criteria, it is the CPs themselves who de facto create the criteria for selecting judges, and they hand-pick them,[13] thus serving as gatekeepers to the judiciary.[14] Court presidents also wield significant managerial powers regarding their courts, ranging from staffing the courts with administrative personnel and controlling the court's budget[15] to creating rules for case assignment, assigning judges to panels and selecting judges for grand chambers at top courts (administrative and financial JSG).[16]

Secondly, CPs form two informal groups which also exert strong influence outside the judiciary (normative JSG): the *college of presidents of regional courts* and the *trinity of top courts presidents*. The college of presidents of regional courts consists of the presidents of all eight regional courts who meet four times a year. Their significance is underlined by the

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[7] Kühn 2012, *supra* note 6, at 609.

[8] Art. 73 of the Law No. 6/2002 Coll., On the Courts and Judges.

[9] Art. 8(c) to (g) of the Law No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors.

[10] This goes for the Supreme Court and the Supreme Administrative Court, *see* art. 70 of the Law No. 6/2002 Coll., On the Courts and Judges, and art. 124 of the No. 150/2002 Coll., the Code of Administrative Justice.

[11] This goes for the presidents for high and regional courts; *see* art. 73 of the Law No. 6/2002 Coll., On the Courts and Judges. Assignment to the district courts needs to be in consultation with the presidents of the respective regional courts, who are thus "masters" of district courts as well.

[12] An attempt by the former president of the Czech Republic, Václav Klaus, to circumvent this rule was thwarted by the Czech Constitutional Court; for a concise description of the circumstances, *see* KOSAŘ, *supra* note 5, at 174–175, and Bobek, *supra* note 3, at 263–265.

[13] For further details on the selection of judges, *see* KOSAŘ, *supra* note 5, at 188–191 and 215–216. The rules for the selection of judges for the Supreme Court and the Supreme Administrative Court are set out in publicly available court presidents' memoranda; at the regional court level, the situation is rather chaotic, *see* Kristián Léko, *Výběr českých soudců ovládá chaos*, LIDOVÉ NOVINY, June 5, 2017.

[14] Kühn 2012, *supra* note 6, at 612; and Kosař, *supra* note 2, at 97 and 100.

[15] Arts. 124 to 127 of the Law No. 6/2002 Coll., On the Courts and Judges; Art. 29 of the Law No.150/2002 Coll., the Code of Administrative Justice.

[16] Kosař, *supra* note 2, at 100.

fact that it is reportedly difficult to push any change without the approval of the college.[17] The trinity of top courts presidents[18] is formed by the presidents of the Supreme Court, the Supreme Administrative Court and the Constitutional Court. Each of the presidents has always exercised a significant influence on the Czech judiciary,[19] and since 2015, they solidified their position by sharing their views at regular informal meetings.[20]

Judicial boards are advisory bodies that, since 2002, exist at almost every court.[21] Judicial boards are composed of three to five judges of the respective court elected by all the court's judges for a five-year term. Their task is to comment on various issues concerning the functioning of the court: candidates for the positions of the president and vice-president of the court, temporary and permanent secondment of judges, drafts of work schedules setting rules for case assignment etc.[22] Owing to the non-binding nature of judicial boards' recommendations and the fact that CPs partly set their agenda, the strength of judicial boards depends primarily on the personality of the CPs and their willingness to cooperate and listen.[23] Nevertheless, the fact that they must be at times mandatorily consulted gives them some, albeit informal, power.

The *Judicial Academy* prepares and educates future judges and provides continuing education for current judges and other persons serving in the judicial system (clerks, advocates, notaries, public prosecutors etc.),[24] thus playing a crucial role in educational JSG. The Judicial Academy, established in 2002, is led by the Director of the Judicial Academy, appointed by the MoJ,[25] and the Board of the Judicial Academy which determines the content of the education provided by the Judicial Academy. The Board has 15 members and is composed of judges and public prosecutors, who are required to have

[17] The minutes from the meetings of the college are sent to the MoJ and discussed there, *see* KOSAŘ, *supra* note 5, at 179–181, and Kosař, *supra* note 2, at 100–101.

[18] This term for the group has not been coined officially.

[19] The most vocal one is Josef Baxa, President of the SAC, who is also an ardent supporter of introducing a judicial council model of JSG.

[20] This is also due to the common ground found between the three presidents, Josef Baxa (SAC), Pavel Šámal (SC), and Pavel Rychetský (CC); *see* Kosař, *supra* note 2, at 101.

[21] Where there is fewer than 11 judges, the plenary session consisting of all the judges fulfils the tasks of a judicial board; *see* Arts. 46 and 47 of the Law No. 6/2002 Coll., on Courts and Judges.

[22] Arts. 50–53 of the Law No. 6/2002 Coll., On the Courts and Judges.

[23] Kosař, *supra* note 5, at 178–179.

[24] Art. 129 to 133 of the Law No.6/2002 Coll., On the Courts and Judges.

[25] Art 130(3) of the Law No.6/2002 Coll., On the Courts and Judges.

majority together, and persons from other legal professions such as academics, advocates or notaries.[26]

Disciplinary panels are the last JSG body to be mentioned. Since 2008, there are separate mixed disciplinary panels composed of three judges and three non-judges functioning under the Supreme Administrative Court.[27] The panels have broad powers regarding a judge's career, as the sanctions they can impose on disciplined judges include not only a reprimand or several types of salary reductions, but also their dismissal. A Disciplinary panel's role is further strengthened by the fact that its decisions cannot be appealed. Nevertheless, this role is conditioned by the activity of those entitled to initiate the disciplinary proceedings – the Minister of Justice, CPs and the President of the Czech Republic.[28]

II. Critical Junctures: Changes to Judicial Self-Government

The Czech model of court administration has long rested on three pillars – the MoJ, CPs and disciplinary panels – to which new ones – judicial boards and the Judicial Academy – were added only recently. The MoJ-CPs-disciplinary panel model of court administration was present in Czechoslovakia ever since its formation after the fall of the Austro-Hungarian Empire. In a nutshell, apart from both introducing judicial boards that only play an advisory role and cannot, de jure, decide on anything and establishing the Judicial Academy, which has powers related only to a narrow dimension of court administration, there were no significant changes to the JSG in Czechia since the Velvet Revolution. None of the events that led to the introduction of nation-wide judicial councils in other countries had such an impact in Czechia. Neither the revolution itself, nor the subsequent democratization of the country resulted in the introduction of a new model of court administration. Neither did the EU Accession Process: in 1997, the European Commission concluded simply that "[t]he Czech judiciary [was] independent" and it thereafter devoted little attention to the system of court administration and separation of powers in the accession progress reports on Czechia. Therefore, it is fitting to instead discuss the partial modifications of the long existing model within which CPs can be considered the primary

[26] Art 130(2) of the Law No.6/2002 Coll., On the Courts and Judges. As of 2017, judges alone do not have a majority on the board, although the rules permit it: there are 7 judges, 2 public prosecutors, 3 academics, 1 advocate, 1 lawyer from the MoJ, and a former constitutional justice/ombudsman.

[27] The panel is composed of one judge from the SAC, one judge from the SC, one judge from regional or district court, one attorney, one state prosecutor, and one academic; *see* Art. 4(1) of the Law No.7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors, as amended by the Law No. 314/2008 Coll. (hereinafter "2008 Disciplinary Code"). For more info on disciplinary panels, *see* DAVID KOSAŘ & TEREZA PAPOUŠKOVÁ, KÁRNÁ ODPOVĚDNOST SOUDCE V PŘERODU: PONAUČENÍ Z ČESKÉ REPUBLIKY (2017).

[28] Art. 8(2) and (3) of the 2008 Disciplinary Code. Note that the Public Defender of Rights can initiate disciplinary proceedings as well, but only in the case of court officials.

JSG actors, and where disciplinary panels, judicial boards and the Judicial Academy play rather a marginal, but still JSG related, role.

Let us concentrate on the marginal JSG bodies first. *Disciplinary panels* existed since the very founding of the Czech Republic[29] and their functioning has changed only twice – in 2002 and 2008.[30] The power to initiate disciplinary proceedings has always been entrusted to CPs and the Minister of Justice.[31] Since 2008, the President of the Czech Republic and the Public Defender of Rights[32] also have this power, however they use it very rarely.[33] Whereas disciplinary panels have always been empowered to use the harshest sanction possible – dismissal of the judge facing discipline – as well as to decide on salary reductions or impose reprimands, since 2002 they have lost the power to reassign a judge to a court of the same or lower level. Between 1993 and 2008 disciplinary proceedings were two-tiered,[34] with high courts or, until 2002, regional courts serving as the first instance and the Supreme Court serving as the appellate one.[35] Since 2008, there is only one disciplinary tier – the Supreme Administrative Court. It has always been the case that disciplinary panels were composed of judges, however, since 2008 non-judges were added to the panels and the parity of them and judges was introduced.[36] The official rationale behind this change was to increase the objectivity of disciplinary panels' decision-making and to enrich disciplinary proceedings with views that cannot be expected of judicial members of disciplinary panels.[37] The real aim was then to tighten the proceedings.[38]

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[29] In fact they existed even before, in Czechoslovakia. *See* MICHAL PRINC. SOUDNICTVÍ V ČESKÝCH ZEMÍCH V LETECH 1848–1938 (SOUDY, SOUDNÍ OSOBY, DOBOVÉ PROBLÉMY) 143–149 (2015).

[30] *See* the Law No. 412/1991 Coll., on Disciplinary Liability of Judges, the Law No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors (hereinafter "2002 Disciplinary Code") and the 2008 Disciplinary Code.

[31] Note that from 2002 to 2008 a judge accused of an offense could request that the offense be dealt with in disciplinary proceedings. Previously, the law enforcement authorities could refer the matter to the disciplinary panels.

[32] Nevertheless, she can initiate the disciplinary proceedings only against court officials.

[33] David Kosař & Tereza Papoušková, *Přinesla "Pospíšilova" reforma kárného řízení skutečně zpřísnění kárného postihu českých soudců?* 25 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 219 (2017).

[34] From 1993 to 2002, the proceedings were only one-tiered for judges of the Supreme Court.

[35] Art. 5 of the Law No. 412/1991 Coll., on Disciplinary Liability of Judges and art. 3 of the 2002 Disciplinary Code.

[36] For information on composition of the panels *see supra* note 27.

[37] *See* the Explanatory Memorandum to the Law No. 314/2008 Coll., amending, among else, the Law No. 7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors.

[38] KOSAŘ & PAPOUŠKOVÁ, *supra* note 27.

Judicial boards as well as the *Judicial Academy* were established by law[39] in 2002. The rationale of the establishment of the Judicial Academy was simple – to ensure the quality of judging by centralizing and regulating the life-long education of judges. As this aim was widely supported, there were no real competing proposals and the only discussion concerned the issue of the hegemonic position of the JA.[40] Nevertheless, the Constitutional Court found the provisions obliging judges to complete further education of a specified length, provided by a determined body and resulting in the evaluation of a judge that could lead to her dismissal unconstitutional.[41] Another rationale going beyond this aim, added into the relevant bill only later, was to empower the JA to also ensure that people entering the judiciary as law clerks are of certain professional quality. However, although the JA is to express its views on a judicial trainee, who is, in the end, selected by the president of the relevant regional court, it hardly ever does so.[42] The rationales and consequences of the introduction of judicial boards are discussed a bit later along with the limitations placed on the leeway CPs have for exercising their powers.

We now turn to the crucial JSG body, *court presidents*. As already emphasized, CPs always had the major say in court administration and the careers of individual judges. Nevertheless, the entities that could determine or influence the way they exercised their powers differed. At first, until 1989, CPs de facto served as the "transmission belt", as they could be recalled by the Communist Party anytime at a whim and had to "transmit" orders from the Communist Party to individual judges in sensitive cases. This changed after the Velvet Revolution. Not only was the MoJ no longer under the control of the Communist Party, but it practically stopped exercising its influence on CPs, even though it de jure could, as the Minister still had the power to recall CPs at any time.[43] There are two major reasons why the "transmission belt" argument no longer worked in Czechia. First, most ministers desperately wanted to avoid this type of confrontation, which would hand the opposition parties the proverbial stick with which to beat the Minister and the ruling coalition.[44] Second, as CPs remained in office much longer than the Ministers of Justice[45]

[39] Law No. 6/2002 Coll., on Courts and Judges.

[40] In the end, judges can fulfil their obligation to educate themselves also by attending education events organized by other courts and universities.

[41] Judgment of the Czech Constitutional Court of 18 June 2002, case no. Pl. ÚS 7/02.

[42] *See* the next Section on the issue of selection of judicial personnel.

[43] Note that presidents of top three courts (the Supreme, the Supreme Administrative and the Constitutional) are appointed and recalled by the President of the Czech Republic. Nevertheless, analogical argumentation applies.

[44] In the 1990s some Ministers dared to take the risk. For instance, when Otakar Motejl became the Minister of Justice in 1998, he soon dismissed five of the eight regional court presidents. However, Motejl's gravitas was rather unique.

[45] There were 16 ministers of justice between 1993 and 2015 and the average length of their terms was less than two years. In contrast, most CPs held office for more than a decade.

they had the best overview of what was going on within the judiciary and this information asymmetry worked in their favour. Therefore, after 1989, no other entity was able to significantly influence the way CPs exercised their JSG-related powers.

This changed in 2002 with the introduction of judicial boards. Entrusted only with consultative function, judicial boards were meant to "address the issue of the involvement of judges in the court administration"[46] and to advise CPs on how they should administer their court and treat its judges. When the government submitted the relevant bill, judicial boards were also supposed to evaluate judges and submit proposals for the assessment of their professional competence. However, discussions in the Chamber of Deputies' Constitutional Law Committee, to which representatives of the judiciary were also invited, resulted in the compromise conclusion that judicial boards were to have only advisory competences. The lack of will to create any new JSG body and the urge to take a step that would at least simulate its creation were the results of the 2000 rejection of the constitutional bill establishing a nation-wide JC with relatively substantive powers that will be discussed below.

The year 2002 brought yet another modification. An informal body potentially able to influence the way CPs exercised their powers emerged. This entity was formed by the eight presidents of regional courts who decided to meet regularly[47] to discuss practical issues that affected all regional courts and take the lead in judicial reform.[48] Although this informal body – the college of regional court presidents – had no statutory basis,[49] the costs of its meetings were and still are covered by the regional court budgets and, more importantly, its voice is often heard not only in professional circles, but also in public debates.

Another modification, this time greatly influencing the position of CPs, came in 2008, when the limitation of their term of office was enacted.[50] It is true that until then the law gave

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[46] Explanatory Memorandum to the Law No. 6/2002 Coll., on Courts and Judges.

[47] *See* Kosař, *supra* note 2, at 100, who claims that according to one of the "founding fathers" of the body, the idea of creating an informal association of regional court presidents was suggested to them by Mr Jean-Michel Peltier, a French liaison magistrate in Prague.

[48] *Id.*

[49] *Id.* In 2007, presidents of regional courts attempted to formalize the college, but both the Minister of Justice and the presidents of the top courts rejected that idea.

[50] Law No. 314/2008 Coll., amending, among other things, the Law on Courts and Judges. Note that this very amendment also transferred the power to discipline judges from exclusively judicial panels at high courts (and the Supreme Court acting as the appellate body) to mixed panels (composed of three judges and three non-judges) at the Supreme Administrative Court.

the Minister of Justice the power to dismiss CPs at any time,[51] however this power was, for the reasons outlined above, de facto non-exercisable.[52] The enactment of a 7-year limit for officials of ordinary courts and a 10-year limit for officials of the two supreme courts[53] came as a reaction to CPs' efforts to secure their irrevocability, also de jure. In the mid-2000s, Czech CPs started to challenge their dismissals before administrative courts and the Constitutional Court, and they eventually won.[54] Moreover, in 2006, the Czech President, for the first time ever, dared to dismiss the President of the Supreme Court. She immediately challenged her dismissal before the Constitutional Court. The Constitutional Court decided not only in favour of the dismissed president, but also struck down the relevant article of the Czech Law on Courts and Judges declaring that it was unconstitutional for the executive to dismiss court officials.[55] The Constitutional Court influenced the 2008 JSG modification one more time when in 2010 it not only found that the introduction of limited terms for CPs and the application of the limited terms to the incumbent CPs were constitutional, but also struck down the provision that allowed the re-appointment of the same court president for a second term.[56] Consequently, all then-incumbent CPs[57] are now gone, which is the most important change within the Czech judiciary since the Velvet Revolution.

The last significant modification of JSG constituted by CPs took place in 2015. This is the year the presidents of the Constitutional Court, the Supreme Court and the Supreme Administrative Court created an informal "trinity of top court presidents". The presidents of these three top courts, each in his or her way, have always exercised their influence on the Czech judiciary. However, they only formed a truly cohesive group in 2015. This was prompted by the resignation of then Supreme Court President Iva Brožová in January 2015,[58] who was eventually replaced by Pavel Šámal. Šámal soon found common ground

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[51] Note, again, that the President of the Czech Republic could have dismissed the presidents of the top three courts.

[52] Compare *supra* note 46. For details *see* Otakar Motejl, *Pohled ministrů spravedlnosti, in* HLEDÁNÍ OPTIMÁLNÍHO MODELU SPRÁVY SOUDNICTVÍ PRO ČESKOU REPUBLIKU 13 (Jan Kysela ed., 2008).

[53] Note that officials of the Constitutional Court are selected from among the constitutional justices, who are appointed for a period of ten years (that is, as the tradition has it, once renewable), therefore their office has always been limited in this sense.

[54] For further details including more doctrinal analysis of these cases *see* Bobek, *supra* note 3, at 263–265.

[55] Judgment of the Czech Constitutional Court of 11 July 2006, case no. Pl. ÚS 18/06. For further details *see* KOSAŘ, *supra* note 5, at 173–175.

[56] Judgment of the Czech Constitutional Court of 6 October 2010, case no. Pl. ÚS 39/08.

[57] The former President of the Supreme Court, Iva Brožová, resigned voluntarily in January 2015.

[58] Iva Brožová was often out of sync with Pavel Rychetský and Josef Baxa.

with the President of the Constitutional Court, Pavel Rychetský, and, in particular, with the President of the Supreme Administrative Court, Josef Baxa.[59]

Apart from the five modifications of CPs' position within the judiciary, there were several attempts to take away some of their powers and vest them in a nation-wide JSG body. These attempts were, however, except for the establishment of the Judicial Academy, unsuccessful. The first one came in 1999 when Otakar Motejl, the then Minister of Justice, introduced a judicial reform package[60] which consisted of a Constitutional Amendment[61] and two brand new laws[62] on courts and judges and whose aim was to replace the MoJ model of court administration with the Judicial Council Euro-model. More concretely, Motejl suggested establishing a High Council of the Judiciary consisting of sixteen members – eight judges and eight members from other legal professions – elected for five years and giving it broad powers concerning the selection and nomination of candidates for judicial office, the appointment and dismissal of judicial officials as well as the training of judges.

The majority of deputies rejected Motejl's reform.[63] There are various explanations for this failure. The most widely accepted one is that politicians did not consent to the transfer of such broad powers to the judiciary, because they were afraid of judicial corporatism and elitism.[64] However, several commentators suggested that the proposal failed because it required a significant amendment of the Czech Constitution,[65] as Motejl was an independent minister without sufficient political support even within the Social Democratic Party that appointed him, as judges themselves were divided and many of them disagreed with the judicial reform package and as many politicians feared that Motejl had become "too big" and successful.[66] Motejl also alienated regional CPs by dismissing five of them in

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[59] Pavel Rychetský and Josef Baxa have known each other well since the late 1990s, as Josef Baxa was a Vice-Minister of Justice in the Government of Miloš Zeman (1998–2002) at the same time Pavel Rychetský was Vice-PM.

[60] *See* the document entitled *Návrh koncepce reformy soudnictví* [The Conception of the Reform of the Judiciary] of 16 June 1999 (no. 1097/99-L), approved by the Czech Government by the decision no. 686 of 7 July 1999. An outline of the reform proposal was published as a special supplement in 5 PRÁVNÍ ROZHLEDY 1, 1–8 (1999).

[61] *See* the Constitutional Bill No. 541/0.

[62] These two statutes were Law on Courts (Bill No. 539/0) and Law on Judges and Lay Judges (Bill No. 540/0).

[63] The Constitutional Bill was rejected in the second reading – 114 MPs voted for the rejection of the bill, 68 MPs voted for the bill – and the other two bills soon followed the same fate – one of them was rejected by 71 MPs (69 opposed the motion to reject it) and the second one by 85 MPs (81 opposed).

[64] *See* Bobek, *supra* note 3, at 269.

[65] The Constitutional Bill, apart from introducing the High Council of the Judiciary, also introduced a maximum age limit for ordinary judges and Constitutional Court Justices, prohibited a renewal of the term of Constitutional Court Justices, changed the status of the Czech National Bank and amended several other provisions of the Czech Constitution.

[66] These explanations are based on informal interviews with former and current politicians and CPs, but they cannot be corroborated by the hard data.

1999. He himself in retrospect blamed the "judicial oligarchy" for the failure of his judicial reform.[67]

The second attempt to establish a new JSG body came in 2002 when Minister of Justice Jaroslav Bureš prepared the new Law on Courts and Judges, which, besides establishing the judicial boards, strove to introduce the Council for Assessing Professional Competence of Judges. This body was to be divided into three sub-bodies, each of them constituted by four non-judicial members and five judicial members elected by judges of selected courts for a three-year period, and was to be empowered to assess the professional competence of judges whenever asked to do so by authorized proposers; the decisions of the body were to be appealed before the Supreme Court. Nevertheless, the Constitutional Court struck the relevant part of the law down. It did so for several reasons, the crucial ones being that the competence of judges should be assessed, due to the need to preserve their independence, only before their appointment and that the body could decide on the non-competence of a judge in the presence of only seven members, four of which could have been the non-judicial members appointed by the executive power (the Minister).

The last attempt to establish a new JSG body came in 2012. This time the Minister of Justice (Jiří Pospíšil) prepared a bill which was to change the method for selecting judges and CPs.[68] More specifically, it proposed the creation of mixed commissions, composed of both members of the MoJ and the judiciary, who would select new judges as well as new CPs. However, Pospíšil was dismissed as Minister of Justice before he could present the bill in Parliament. The new minister of justice had less radical views regarding judicial reform, wanted to maintain a friendlier relationship with CPs, and thus scrapped the bill altogether.[69]

To summarize, while there were five successful and three unsuccessful attempts to modify the position of CPs, who are the primary JSG actors, little has changed as far as their powers are concerned. Only one new JSG body that took away some of the CPs' powers, the Judicial Academy, was introduced. However, the Judicial Academy was vested only with very specific powers regarding educational administration of the judiciary and therefore could not change the existing model of court administration, which, in Czechia, rests on three pillars – the MoJ, CPs and disciplinary panels. The motives for preserving such a model are simple: the executive was hesitant to give up its powers and the Czech judiciary was unable to agree on the one way it wanted to govern itself.

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[67] Motejl, *supra* note 52, at 14.

[68] The 2012 Bill also intended to introduce judicial performance evaluation and financial declarations of judges. Both of these tools would give the MoJ the necessary information to counter the existing information asymmetry and to make more informed decisions regarding the promotion of judges.

[69] *See* Jiří Hardoš, *Blažek odložil zavedení výběrových řízení na nové soudce,* PRÁVO, August 2, 2012, at 4.

B. Changes of Judicial Self-Government and the Impact on the Wider Environment

This section maps the impact of the changes of JSG on the wider legal, political and social environment. We map the impact by examining the effect the changes had on five basic values that we consider critical for the proper functioning of the judiciary and its relationship with rest of the society: judicial independence, accountability, legitimacy, transparency and public confidence. We have already said that there was no "big bang" related to JSG in Czechia; furthermore, the changes we identified in the previous section are not necessarily connected to one another and are difficult to arrange into a coherent narrative. Nevertheless, the overall picture emerging from this section is that the judiciary is capable of functioning and sustaining self-governance and the mentioned core values even without a judicial council in place. On the other hand, maintaining such state depends largely on CPs keeping their powers as well as a carefully balanced relationship with other actors of judicial government and government in general.

I. On Mandates, Powers and Independence

Even though there was no JSG "big bang" in Czechia, three notable changes in JSG occurred that may have had some impact on judicial independence, concerning selection of judges, CPs' mandates, and work schedules. All the changes touched the powers or mandates of the CPs, proving that CPs have a substantial potential to influence judicial independence. And although their position gives them the opportunity and resources to guard the external judicial independence from other branches of power during "peaceful times",[70] the setup might at the same time leave individual judges vulnerable and create a space for possible encroachment on internal judicial independence.[71]

Selection and appointment of judges, the first power that was influenced by a change in JSG, is a problematic point of both de jure and de facto independence. As no transparent and detailed de jure criteria for the selection of judges exist, the selection lies de facto primarily in the hands of CPs. Among those, the presidents of regional courts play a prominent role as the law specifies that they control the way district court presidents exercise their powers.[72] The process therefore differs from one supreme or high court to another or from one district of a regional court to another,[73] which creates a potential space for personal corruption and later encroachment of output independence due to the

[70] The recent developments in Hungary and Poland prove that if the other branches of power launch a large-scale offensive on the judiciary, there is little that actors from within judiciary can do.

[71] Kosař, *supra* note 2, at 115–122.

[72] Art. 126 para. 1 letter h) of the Law No.6/2002 Coll., On the Courts and Judges.

[73] Being appointed therefore equals a win in a lottery to a certain degree, *see* Léko, *supra* note 13.

personal loyalty of the selected judges to the relevant CP.[74] A change occurred when apex court presidents set out criteria for selecting judges in the form of memoranda[75] and some regional court presidents even introduced an open selection procedure based upon tests run by the Judicial Academy.[76] This step led partly to a more objective and merit-based selection process and potentially limited the space for favouritism. The change was, however, quite small and happened only in a few courts thanks to a few "enlightened" CPs. As the degree of openness lies almost exclusively in the hands of CPs, however, there are still regions with no open selection procedure whatsoever, and the changes that already took place may be easily reversed.

The second change in JSG to be mentioned is the 2008 implementation of CP term limits; these may have had the biggest impact on the judicial independence of the judiciary so far, both positively and negatively. This move first of all meant that no CP could exert his influence for too long. Moreover, the dynamics between CPs and the MoJ changed – CPs had to find a new balance in the relationship with the MoJ, inventing various and sometimes dubious strategies to preserve their privileges along the way. After the expiration of their mandate, some of them arranged their promotion to a higher court, some switched their position with vice-presidents and some even openly defied the rules completely and nominated some vice-presidents for second terms.[77] The change therefore clearly created space for various political bargains, posing significant challenges also to judicial independence. The actual impact remains to be seen.

The last change in JSG concerned work schedules, issued by CPs and containing detailed rules for case assignment. For a long time, the attention paid to this instrument was rather limited,[78] which created a space for possible corruption and attempts to circumvent case assignments.[79] Recently, however, work schedules again came under academic and public scrutiny,[80] as it came to light that some CPs had rigged the assignment of bankruptcy cases, an area especially prone to corruption.[81] A change came from the Constitutional Court that

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[74] Note that there is no research or direct evidence proving that this claim holds true, which is why we present it only as a potential threat to judicial independence.

[75] The Supreme Administrative Court introduced the memorandum in 2012, the Supreme Court in 2017.

[76] This concerns the Municipal Court in Prague, which introduced the testing in 2014. Some other regional courts use the testing as well (Regional Court in Pilsen, Regional Court in Brno); *see* Léko, *supra* note 13.

[77] *See* Kosař *supra* note 2, at 110–114.

[78] The exception was the early and mid-1990s; *see* e.g. 9 PRÁVNÍ PRAXE (1995).

[79] David Kosař, *Rozvrh práce: Klíčový nástroj pro boj s korupcí soudců a nezbytný předpoklad nezávislosti řadových soudců*, 12 PRÁVNÍK 1060, 1060–1066 (2014).

[80] *See id.*, at 1049–1076, and the newspaper articles cited there.

[81] The term "bankruptcy mafia" was coined for a group with alleged influence in the area. *See id.*, at 1050.

significantly curtailed the CPs' power to set the criteria.[82] Although this change may seem marginal, the impact of the ruling is considerable: by narrowing the space for rigging a case assignment, it potentially boosted the output independence of individual judges and reduced the possibility of corruption.

Despite the abovementioned changes, there was no significant shift in the CPs' powers *vis-à-vis* individual judges. For a long time, the position of CPs could be seen to be the key challenge in Czechia, a challenge that is rarely addressed or thoroughly discussed outside of academic circles. There are not many reported accounts of abuse of CPs' powers,[83] and we cannot be sure how many remain unnoticed; moreover, the case of Slovakia shows that unchecked powers of CPs, combined with other actors, may yield truly pathological results.[84] However, as the cases of Poland and Hungary show, the external threat to judicial independence is gaining momentum and may become an urgent problem in a very short time, once again shifting the focus to the relationship of the judiciary with the other branches of power.

II. On Powers to Discipline

Only two of the JSG related modifications discussed in the first section had considerable impact on judicial accountability – the 2002 and the 2008 reforms that changed the way judges were disciplined. However, there certainly were changes in (the use of) other accountability mechanisms available in Czechia – reassignment within the same court, case assignment, promotion to a higher court, promotion to the position of chamber president, appointment to the grand chamber of the SC, secondment, temporary assignment outside the judiciary, the appointment of a judge to the position of court president or vice-president or the complaint mechanism.[85] Nevertheless, these changes either had other causes[86] or were practically untraceable as they were not changes to de jure mechanisms and hard data on de facto use of these mechanisms are missing.

Therefore, we concentrate on both de jure and de facto changes in the way judges were disciplined after the 2002 and the 2008 reforms and only briefly discuss some changes to

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[82] *See* especially the judgment of the Czech Constitutional Court of 15 June 2016, case no. I. ÚS 2769/15; as well as judgments of 27 May 2004, case no. IV. ÚS 307/03; judgment of 27 September 2005, case no. I. ÚS 93/99; judgment of 21 April 2009, case no. II. ÚS 2747/08; judgment of 28 May 2009, case no. II. ÚS 2029/08; judgment of 20 April 2011, case no. IV. ÚS 1302/10; and judgment of 1 November 2012, case no. IV. ÚS 2053/12.

[83] For an account of some of such incidents, *see* Kosař, *supra* note 2, at 117–118.

[84] *See* KOSAŘ, *supra* note 5, at 236–333.

[85] *See* KOSAŘ, *supra* note 5, at 187–235.

[86] *See* the case of changes to case assignment (work schedules) caused by a ruling of the Constitutional Court described above.

informal accountability. The 2002 reform brought three significant changes to de jure accountability of judges. First, the presidents of the Supreme Court and the Supreme Administrative Court got the power to initiate proceedings not only against judges of "their" courts, but also against the judges of all lower courts. As the presidents of high and regional court already had such a power, the 2002 reform finalized the hierarchical model of initiating disciplinary proceedings. Second, the disciplinary proceedings became unified. Previously, district court judges had been disciplined by regional courts and could appeal to the SC, regional and high court judges had been disciplined by high courts and could also appeal to the Supreme Courts and Supreme Court judges had been disciplined by this very court and thus could not appeal. Afterwards, all judges were disciplined by the high court and could appeal to the Supreme Court. Third, the set of sanctions available was reduced and, after the 2002 reform, disciplined judges could no longer be reassigned to a court of the same or lower level. The 2008 reform also changed several de jure aspects of disciplinary proceedings. First, since 2008, not only could the CP of the relevant or a higher court and the Minister of Justice initiate the proceedings, but so could the President of the Czech Republic.[87] Second, the composition of disciplinary panels changed significantly. Whereas before the 2008 reform judges were judged (disciplined) only by judges, after the reform mixed panels composed of 3 judges and 3 members of other legal professions were introduced.[88] Third, whereas before the reform there was a possibility to appeal against the decision issued in the disciplinary proceedings,[89] there was no such possibility afterwards.[90] Fourth, a new type of disciplinary offense was introduced in 2008 – the breach of CP duties.[91]

As regards de facto accountability, both reforms seem to have had some impact on the frequency, reasons and/or ways judges were actually disciplined. Kosař and Papoušková came to the following conclusions when analysing decisions issued in disciplinary

[87] Compare art. 8 of the 2002 Disciplinary Code and of the 2008 Disciplinary Code. Note also, that the Public Defender of Rights could initiate the proceedings against court officials.

[88] Compare art. 4 of the 2002 and 2008 Disciplinary Codes.

[89] Note that from 1991 to 2002 judges of the Supreme Court had no such possibility, as in this period disciplinary panels were assembled pursuant to a hierarchical pattern – disciplinary panels at regional courts decided on motions against judges of district courts; disciplinary panels at high courts decided on motions against judges of regional courts as well as against judges of the relevant high court; and disciplinary panels at the Supreme Court decided on motions against judges of the Supreme Court. In the next period, i.e. from 2002 to 2008, all first-instance disciplinary proceedings were held at high courts. Comp. art. 5 of the Law No. 412/1991 Coll., on Disciplinary Liability of Judges (hereinafter "1991 Disciplinary Code") and art. 3 of the 2002 Disciplinary Code.

[90] Compare art. 21 of the 2002 and 2008 Disciplinary Codes.

[91] *See* art. 87 of the Law No. 6/2002 Coll, on Courts and Judges, as amended by the Law No. 314/2008 Coll. Otherwise judges could still be disciplined for infringing upon dignity of the judicial office or threatening public confidence in independent, impartial and just decision-making of courts.

proceedings initiated from the beginning of the year 1993 till the end of the year 2014.[92] First, both reforms seem to have influenced the number of disciplinary motions. Whereas before the 2002 reform on average 26 motions a year were filed, after the reform this number increased to 33 and dropped again to 28 after the 2008 reform. Second, the 2008 reform brought a slight increase in the proportion of proceedings initiated by the Minister of Justice. In the period 1993-2002, 10 % of proceedings were initiated by the Minister and in the following period the number was nearly the same (9 %), but in 2008-2014 it increased to 16 %. Third, after the 2008 reform judges were less often prosecuted for having caused delays in court proceedings and more often for disciplinary offenses related to judicial independence and ethics. More concretely, whereas before 2002 reform 61 % and before the 2008 reform 66 % of disciplinary proceedings were initiated based on the first grounds and 7 and 9 % based on the second, after the reform it changed to 54 and 20 %. Fourth, the 2008 reform also brought a significant decrease in the proportion of disciplinary proceedings that resulted in the imposing of a sanction. The proportion was 55 % in the period of 1993-2002; this increased to 60% in the next period and dropped to 40% after the 2008 reform. All in all the successfulness of the disciplinary motions, measured as the proportion of proceedings that resulted either in the imposing of a sanction or the resignation of the disciplined judge, also dropped significantly after the 2008 reform, as it was 53 %, whereas in 1993-2002 it was 68 % and in 2002-2008 even 71 %.

Apart from the abovementioned changes, judicial accountability also evolved in its informal aspect. Judges are more and more often scrutinized by the media and the broader public[93] and, as CPs will eventually lose their offices, they may feel the urge to please the judges of the court in which they preside, i.e. their future colleagues. However, only the last of these evolvements can be directly related to a concrete event, let alone to a concrete modification in JSG in Czechia.

III. On Mandates, Selection and Legitimacy

It is hard to put a finger on a concept like judicial legitimacy alone, and it may prove even more difficult to cover the effects that JSG changes had on it.[94] Nevertheless, it is possible to say that it is following the (legal) rules in the first place which provides any organ with a basic source of legitimacy. In this respect, it can be argued that limiting CPs' mandates may have indirectly caused a decrease of judicial legitimacy in its legal dimension.[95] Although

[92] KOSAŘ & PAPOUŠKOVÁ, *supra* note 27.

[93] In 2010, a website platform for discussing personal experience with individual judges and opinions on them was launched. *See* znamysoudce.cz.

[94] To avoid overlap with the account of impact on public opinion, we omit the social dimension of judicial legitimacy.

[95] This understanding connects legitimacy with legality and claims that judiciary is legitimate when it adheres to legal rules; *see* e.g. CARL SCHMITT, LEGALITY AND LEGITIMACY (2004); and DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL

the change of law and the intervention of the Constitutional Court did not cause a decrease in legal judicial legitimacy, the subsequent conduct of several CPs, who circumvented these rules to retain their mandates,[96] surely did have some impact.

Two other changes in JSG had potential influence on the normative dimension of judicial legitimacy.[97] In the first place, we must mention the selection of judges, which is arguably the area with the greatest importance for judicial legitimacy, the current state of which is one of the biggest legitimacy issues. As the rules for selection are in the hands of (some) CPs and are rather opaque at most courts, any improvement here should boost judicial legitimacy.[98] Despite partial improvement in this area (notably regarding the selection of judges at the SC, the SAC, and the Municipal Court in Prague[99]), the rules are still far from unified and transparent. The 2003 change in the age limit for a judge's eligibility for office from 25 to 30 years may have resulted in a minor boost in legitimacy.[100] Secondly, the introduction of judicial boards in 2002 promised that at least some of the courts would be run somewhat more democratically, constraining to a certain degree the monocratic CPs and possibly boosting legitimacy. Whether this in fact happened depends significantly on the person of the CP.

There are other judicial legitimacy issues in Czechia, although non-JSG related, that are worth mentioning. The foremost of these is the composition of the judiciary and its changes after the fall of the communist regime. After the Velvet Revolution, the new regime attempted to purge the judiciary from judges directly involved in the execution of the "communist justice".[101] Still, many judges who were former members of the Communist Party remained in the judiciary[102] and a list of them was published after an intervention by the CC,[103] which may be seen by many as delegitimizing the judiciary.

SCHMITT, HANS KELSEN AND HERMAN HELLER IN WEIMAR (1999); and various contributions in LEGITIMACY IN INTERNATIONAL LAW (Rudiger Wolfrum & Volker Roeben eds., 2008).

[96] *See* Kosař, *supra* note 2, at 110–112; Ladislav Derka, *Pro soudní funkcionáře právo neplatí?* 4 SOUDCE 7 (2015); Viktor Derka, *Ústavnost opakovaného jmenování soudních funkcionářů,* 23 JURISPRUDENCE 3 (2014).

[97] *See* e.g. Peter G. Stillman, *The Concept of Legitimacy*, 7 POLITY 32 (1974).

[98] Better rules for selection could have a sort of "trickle-down effect", as it may improve also the quality of judges and, subsequently, of the judicial process and decisions.

[99] *See supra* notes 75 and 76.

[100] Before, many may have had the impression that "kids" with little life, to say nothing of legal, experience, sit on the bench; *see* Kühn 2012, *supra* note 6, at 614.

[101] For an overview, *see* KOSAŘ, *supra* note 5, at 167–173; and David Kosař, *The Least Accountable Branch,* 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 234, 251–252 (2013).

[102] At the beginning, almost two thirds of judges were ex-communists.

[103] *See* the judgment of the Czech Constitutional Court of 15 November 2010, case no. I. ÚS 517/10.

Secondly, the Czech judiciary has often been criticized for the excessive length of proceedings.[104] Even though this criticism lacks objective foundation,[105] the "slow judiciary" myth seems to persist.[106]

The third legitimacy issue is corruption inside the judiciary, which always delegitimizes judiciary as a whole, especially when it seems to be systemic and organized, as in the case of the so-called "bankruptcy mafia".[107] Lastly, several high-profile criminal cases with (former) politicians[108] accused of corruption have been making their way through the judiciary recently. Although cases of political corruption are understandably difficult to judge and take a long time, a high degree of disagreement between courts often results in higher courts quashing the decisions of lower courts. This in turn may create in some people the impression that courts are both unable to "finish" the cases because they are corrupt as well, and that criminal justice is being politicized and serves a different purpose than it should.

IV. On Transparency

There is only one change in judicial transparency that may be connected with (changes in) JSG[109] and that is the opening up and standardizing of the selection procedure for judges at one of the eight regional courts in Czechia. This change is related to the establishment of the Judicial Academy, as the president of the Municipal Court in Prague agreed with the JA that it will administer written tests and score the candidates and thus determine who will be invited for an interview.[110] As noted above, although one of the de jure aims of the JA is to "participate in the selection of persons who apply for a position of a law clerk",[111] except

[104] For this, Czechia was criticised many times by the European Court of Human Rights.

[105] The length of proceedings in Czechia is, if compared to other EU countries, average. *See* the European Commission's 2017 EU Justice Scoreboard, at 7–11.

[106] *See* for example Kristián Léko, *Soudci by se „pod lupou" víc snažili*, LIDOVÉ NOVINY, July 17, 2017, at 5, where one of the respondents, a professional lawyer, claimed that "*If the judiciary is slow, at least make it transparent*."

[107] *See supra* note 81.

[108] This includes e.g. the former Prime Minister Petr Nečas and his spouse Jana Nečasová, former Minister of Health David Rath, and Marek Dalík, an influential lobbyist and an advisor to the former Prime Minister Mirek Topolánek.

[109] Note that we are speaking mainly about systemic changes, as "local" (i.e. court specific) changes in judicial transparency may appear any time a new court president is appointed and thus has an opportunity to adopt a new transparency policy.

[110] *See*, for instance, Léko, *supra* note 13.

[111] *See* art. 132 of the Law 6/2002 Sb., on Court and Judges.

for the case just mentioned neither this very aim nor its modification consisting in the participation in the selection of judges was actually ever fully realized.[112]

Other changes in judicial transparency were connected rather with two other evolvements – the adoption of Law No. 106/1999 Coll., on Free Access to Information, and the advancement in information and communications technologies. The first evolvement, for instance, opened a way to find out which judges were members of the Communist Party before 1989[113] or which constitutional justices deal with the cases assigned to them in the most timely and responsive manner.[114] The second evolvement mainly brought the possibility to publish court decisions online. So far, only the top three courts have taken full advantage of this possibility.[115] The decisions of other Czech courts have been published since 2011, but only to a very limited extent.[116] While the non-apex courts were instructed by the Ministry to publish every important decision, in 2015, for instance, they published only 75 of them.[117] Another step that was made possible due to the advancement in ICT was the 2007 launch of the "eJustice" (electronic justice) project. The project resulted in the creation of an online form for filing an electronic payment order and for making any other submission to a court; the publication of dates, times and venues of court hearings and of information regarding the state of court proceedings; and in the aggregation and publication of statistics on the activity of individual courts.[118] Last but not least, since 2015 all courts publish information on their contracts and paid invoices in a central online database that is accessible free of charge.[119]

All these developments influenced not only the way relevant information is made available and findable but they also had an impact on who uses it. It is logical that before launching

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[112] Only three more of the eight regional courts organize an open selection procedure for law clerks, but they do so without assistance of the Judicial Academy.

[113] The MoJ published a list of such judges following to the judgment of the Czech Constitutional Court of 15 November 2010, case no. I. ÚS 517/10.

[114] *See* Tomáš Němeček, *Tajná data z Ústavního soudu*, LIDOVÉ NOVINY, February 28, 2011; Tomáš Němeček, *Zachraňte doktora Balíka*, LIDOVÉ NOVINY, March 5, 2012; and Tomáš Němeček, *Doktorka Lastovecká se topí*, LIDOVÉ NOVINY, February 23, 2013.

[115] The Supreme Court began publishing all its decisions online in 2000. The newly established Supreme Administrative Courts followed this path and started publishing all decisions online soon after its establishment in 2003. The Constitutional Court made this step in 2006.

[116] They are accessible through http://www.nsoud.cz/Judikaturans_new/judikatura_vks.nsf/uvod.

[117] The Office of the Public Defender of Rights, 2017. *Výroční zpráva 2016*, at 57: https://www.ochrance.cz/file admin/user_upload/zpravy_pro_poslaneckou_snemovnu/Vyrocni-zprava2016_web.pdf

[118] For more details *see* the web http://www.reformajustice.cz/ejustice/ and other websites it references.

[119] *See* http://data.justice.cz/SitePages/DomovskaStranka.aspx.

the relevant databases only big entities like the MoJ or companies developing and selling legal information systems could make use of the information. However, currently also the media, researchers and civil society can easily utilize it. Nevertheless, despite all these changes, judicial transparency remains a much-debated issue as the public still lacks information on the activity of individual judges[120] or on individual candidates for a judicial position.[121]

V. On Public Confidence

Changes in JSG can have repercussions not only for the legal and political fields, but also for the wider social field, i.e. for the relationship between the judiciary and the public. In general, one of the most important indicators of this relationship is the level of public confidence, which can be described as the public's belief in the reliability, honesty and ability of courts and judges, and the belief that the courts act competently in the sense that they are able to perform the functions that are legally or constitutionally assigned to them.[122]

Public confidence in the judiciary stems from two broad groups of factors:[123] cultural (confidence originates in long-standing and deeply-seated beliefs that are rooted in cultural norms) and institutional (confidence is related to institutional performance). Thus, the influence of changes in JSG on the level of public confidence is predominantly indirect, and this only happens in the event that the changes somehow affect the performance of the courts and judges. As already mentioned, there was no JSG "big bang" in Czechia that would have had this power. However, the Czech example shows that a judiciary can enjoy a reasonable level of public confidence even without adopting a strong model of JSG or establishing a judicial council.

As pictured in Figure 1, trust in courts, measured continually since 1990, is gradually increasing. The trend seems to be influenced chiefly by broader historical socio-political development. In 1990, shortly after the fall of the authoritarian regime, public confidence in courts was very low, with a considerably higher percentage of distrusting respondents (almost double) than trusting ones. As summarized by Sztompka,[124] in communist countries, trusting the state and its political institutions, including courts and judges, was

[120] Note that, for instance, in Slovakia such information is available through the website https://otvorenesudy.sk/.

[121] However, *see* above for information on the quite transparent selection of judges for the two apex courts.

[122] George W. Dougherty, Stefanie A. Lindquist & Mark D. Bradbury, *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary*, 38 STATE AND LOCAL GOVERNMENT REVIEW 176 (2006).

[123] William Mishler & Richard Rose, *What Are the Origins of Political Trust? Testing Institutional and Cultural Theories in Post-communist Societies*, 34 COMPARATIVE POLITICAL STUDIES 30 (2001).

[124] PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY (2000).

seen as naive and stupid. Moreover, under the authoritarian regime, the judicial profession suffered from low prestige (both in social and financial terms)[125] and was considered to be unattractive and corrupt. After 1989, public confidence in courts has gradually been restored, probably a sign of a successful transformation that also included a turnover in judicial ranks. In 2006, the share of respondents trusting in courts exceeded the share of distrusting respondents for the first time and, after some volatility, this has become a stable pattern since 2014.

Figure 1: Trust in courts in Czechia, 1990-2017 (in %)[126]

In addition to institutional confidence, it is also important to assess public confidence in judges, as confidence in institutions can differ from confidence in individuals. Unfortunately, a continual measurement of public confidence in judges is missing in Czechia. As a proxy indicator, prestige of judges (as a profession), measured since 2004, can be used. As pictured in Figure 2, the social position of judges in the last almost fifteen years has been very high, with no significant swings. Judges belong to the group of top ten most prestigious professions according to the Czech public, together with doctors, teachers, scientists and nurses. Thus, it seems that after the damage to prestige and credibility of judges and courts caused in the previous regime, they have successfully reclaimed their social position, or are at least on the way to doing so.[127] This is probably an

[125] *See*, e. g. KÜHN 2011, *supra* note 6, at 53.

[126] Source: Czech Social Science Data Archive of the Czech Institute of Sociology. The remainder (to 100 %) are "do not know" answers. The question asked was: "Please tell us, do you trust or distrust the courts?" Possible answers: I definitely trust/I rather trust/I rather distrust/I definitely distrust them.

[127] The restoration of the social position of judges becomes evident also when looking at the rise of their salaries. In Czechoslovakia in the 1950s, judges' salaries were only slightly above the national average salary, and below e.g. miners' or bus drivers' salaries, *see* OTA ULČ, MALÁ DOZNÁNÍ OKRESNÍHO SOUDCE 76 (1974). In 2017, a judge's salary base is calculated by multiplying the average nominal monthly salary of individuals in the non-business

effect of a broader successful transformation process of the judiciary managed without blatant scandals or affairs eroding the emerging public confidence in courts or judges. However, the forms or levels of JSG do not seem to play any distinct direct role in this process.

Figure 2 Prestige of the top eight professions in Czechia, 2004-2016 (in %)[128]

VI. On Lateral Selection and Male Court Presidents

As there were few JSG changes that would significantly affect the CIATL values, it follows that such changes would have little impact on other values as well, apart from diversity. The professional diversity of the judiciary may have been influenced by the presidents' of the Supreme Court and the Supreme Administrative Court intentions to select judges not only from the ranks of professional judges, but also from the ranks of academics and other legal professions.[129] It was, however, only at the Supreme Administrative Court that the change was actually implemented; it remains to be seen whether this will be the case at the Supreme Court as well; there are no signs of such change happening at the lower courts.[130] Gender-wise, the Czech judiciary is quite constantly[131] a predominantly female

(public) sector by the coefficient of 3. The salary base is then in turn multiplied by a specific coefficient depending on the position of a judge etc.

[128] Source: Czech Social Science Data Archive of the Czech Institute of Sociology. Legend: The data in the figure represent the average score of prestige on a scale from 1=the lowest prestige to 99=the highest prestige.

[129] *See* the memos published by the CPs, *supra* note 75.

[130] Kühn 2012, *supra* note 6, at 613–616.

profession, with women occupying about 66% of the posts at the district courts, 57% of the posts at the regional courts, 44% of the posts at the high courts, and 25% at the apex courts,[132] although the positions of CPs and vice-presidents, especially at the higher courts, tend to be dominated by men.[133] Furthermore, there is no available data about the ethnic diversity of the Czech judiciary, but we may safely guess that it reflects the mostly homogeneous Czech population. Thus, no apparent changes, including those related to JSG, took place that would affect the gender or ethnic diversity of the judiciary.

C. Place of Court Presidents in the Separation of Powers and their Link to the People

In this final section, we take a step back from the five values and assess the impact of JSG on the modern state in a more general sense, namely on the architecture of the separation of powers and the democratic principle. Similarly to the previous parts, it is the position and powers of CPs, who most often come into contact with the other branches of power, which pose the biggest challenge to the separation of powers. This is caused by the fact that court administration in Czechia has traditionally belonged to the executive branch,[134] the telling proof of which is that the term "state's administration of courts" is used to this day.[135] We have already stated that the state administration of courts is a task of CPs together with the MoJ.[136] As there can be no doubt that MoJ is part of the executive, it is the role of CPs that may create confusion. Until 2008, it was safe to assert that CPs were part of the executive power, as they carried out a role that was traditionally understood as executive and the rules that apply in the administration applied to them as well.[137] After 2008, however, the position of CPs changed. The Constitutional Court declared that CPs' *specific* role is to ensure the proper functioning of the judiciary (separation of functions/institutions),[138] and, consequently, it struck down a provision that declared CPs part of the public administration for personal incompatibility.[139] As a result, CPs are on the

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[131] Kühn 2010, *supra* note 6, at 191, reports that in 2001 the numbers were quite similar.

[132] *See* České soudnictví 2016: Výroční statistická zpráva, Ministerstvo spravedlnosti, 2017, at 12, 53, 94, 105, and 111. The causes of underrepresentation of women at the upper echelons of the Czech judiciary are not yet determined.

[133] *See* http://portal.justice.cz/Justice2/Soudci/soudci.html.

[134] This tradition dates to the times of Austro-Hungarian Empire; *see* PRINC, *supra* note 29, at 209–220.

[135] *See* Art. 119 of the Law no. 6/2002 Sb., On Courts and Judges; and art. 74(2) of the Law no. 6/2002 Sb., On Courts and Judges, which explicitly admits that the function of the court president is part of the public administration.

[136] Art. 119(2) of the Law no. 6/2002 Sb., On Courts and Judges.

[137] Especially the rule that who appoints, dismisses as well.

[138] Judgment of the Czech Constitutional Court of 11 July 2006, case no. Pl. ÚS 18/06.

[139] Judgment of the Czech Constitutional Court of 4 May 2010, case no. Pl. ÚS 7/09.

one hand a part of the public administration with administrative powers, but on the other, their position is protected by judicial independence, which makes them what could be best described as *sui generis* members of the public administration. Accordingly, as the position of CPs was no longer of a predominantly executive nature, and the rules applicable in the executive no longer applied to them, we can now say that the role of CPs, and the separation of powers with it, was altered.

We now briefly turn to the democratic principle. This principle requires that the people are more or less directly connected with their representatives and it has always been a part of debates concerning the Czech judiciary, although different terms have often been used. For instance, during the 2017 parliamentary elections, almost all of the nine later elected political parties emphasized that the quality of judges and their work had to be subjected to public inspection and that judges had to be personally accountable for the judgements they issue.[140] These measures were to ensure that people knew who the judge deciding their case was and how well she performed her function. Therefore, although there has never been a proposal in Czechia to introduce the election of judges by the people or the Parliament, including people in the scrutiny of the judiciary has been always called for. So far, however, this has materialized only in the introduction of non-judicial members into the disciplinary panels and in the preservation of the Communist system of lay judges, i.e. laymen who are elected by municipal or regional councils and have a majority say in some matters decided at district and regional courts.[141] The legitimacy chain between the people and judges thus remains rather loose, which is even more true in the case of court presidents – the primary JSG actors – whose selection remains shrouded in mystery in Czechia.

D. Conclusion

This article argued that, despite having no judicial council, there is indeed judicial self-government in Czechia. Firstly, it showed that there are several bodies that take part in JSG, although the crucial role is played by the CPs, who hold substantial formal powers and informal influence *vis-à-vis* the judiciary and the other branches of power, namely the MoJ (Section A). Furthermore, the article stressed that the lack of institutionalized JSG in the form of a judicial council does not bar the judiciary from functioning properly in the wider legal, political and social environment, although there are some problematic points (Section B). Thus, the JSG in Czechia on the one hand facilitates, but, on the other hand, also potentially endangers judicial independence by concentrating power in the hands of CPs; similarly, JSG may have increased the number of disciplinary motions, but at the same time may have decreased their successfulness. By bringing transparency to the selection of judges, CPs may have given the judiciary a legitimacy boost; nevertheless, by not

[140] *See* e. g. http://www.ceskatelevize.cz/ct24/tema/484360-volby-2017-spravedlnost-a-stav-justice.

[141] *See* arts. 64 and further Law No. 6/2002 Coll., on Courts and Judges.

respecting the prohibition of their own reappointment and because of the lack of transparency in the informal JSG processes, the legitimacy may again suffer. As far as public confidence in judiciary goes, it remains fairly strong and apparently unaffected by the JSG issues. Finally, from a more general point of view (Section C), we have showed that the JSG influenced the separation of powers in Czechia in a peculiar way by making CPs *sui generis* actors belonging somewhere between the judiciary and the executive branch, while not contributing to the democratic connection between the people and the judiciary. To sum up, calling Czechia the "black sheep" for not establishing a judicial council may therefore not be appropriate, as the judiciary has been able to sustain a substantial amount of JSG. Whether it will be able to hold onto it and manage to guard the crucial values is a question that remains to be answered; whether a judicial council would help it in this task can only be hypothesized.

Articles

Judicial Self Government and the Sui Generis Case of the European Court of Human Rights

By Başak Çalı[*] & Stewart Cunningham[**]

Abstract

In this article we explore the operation of judicial self-government (JSG) at the European Court of Human Rights (ECtHR), paying particular attention to how JSG operates in the judicial selection procedures and in the administration of the court. We find that JSG at Strasbourg is highly variable with relatively weak levels of judicial influence on the selection of judges contrasted with a high degree of control over court administration. We go on to analyze how the dual nature of JSG at the ECtHR (strong post-election and weaker pre-election) promotes or hinders a range of values, namely, independence, accountability, transparency and legitimacy. We argue that the JSG practices at the ECtHR prioritize judicial independence at the expense of accountability. The picture with regard to transparency is mixed and while judicial decision making itself is fully transparent, wider JSG practices at Strasbourg are largely non-transparent. We note that legitimacy concerns were a key motivating factor in many of the key JSG reforms undertaken by the ECtHR in recent years and explore whether these have had the desired impact. We conclude by arguing that the differences in reach and form of JSG at the pre and post-election processes strike a careful balance in respecting the separation of powers and the democratic principle.

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A. Introduction

The European Court of Human Rights (ECtHR) presents a sui generis case to study the forms, evolution and impacts, perceived and measurable, of practices of judicial self-government (JGS) at the supranational level. The reach and scope of JSG at Strasbourg is highly variable, depending on what aspects of the Court's life one studies. JSG at the point of judicial selection is at best 'embryonic'[1] since the introduction of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (Advisory Panel), as the process continues to favor the primacy of the Parliamentary Assembly of the Council of Europe (PACE). Once elected, however, sitting judges enjoy unbounded powers of JSG with respect to the management of the Court's judicial activities, without much, if any, interference from a superior body. In particular, the President of the Court as well as Section Presidents, alongside the Jurisconsult and the Registry, exercise JSG in managing the Court's work and giving it jurisprudential direction.

In what follows we first provide an overview of the forms of JSG at the ECtHR pre and post-election. After setting out how JSG operates at Strasbourg we go on to analyze how its dual nature (strong post-election and weaker pre-election) promotes or hinders a range of values, paying particular attention to independence, accountability, transparency and legitimacy. Finally, we turn to how JSG at the ECtHR has impacted on the separation of powers at the Council of Europe and on understandings of the democratic principle.

The central argument of this article is twofold. First, in terms of values, we suggest that the current JSG practices at the ECtHR are better at promoting legitimacy and judicial independence but far weaker on transparency and accountability. The strength of post-election JSG, for example, contributes significantly to the very high levels of judicial independence enjoyed by judges at the ECtHR. It is the recent reforms to judicial selection, however, that appear to have most affected legitimacy, with improving legitimacy one of the key motivations behind these reforms. The picture with regard to transparency is mixed and while judicial decision making itself is fully transparent at Strasbourg, wider JSG practices, both at the point of judicial selection and in terms of court administration are largely non-transparent. Accountability is limited at the ECtHR, perhaps in a direct trade-off with the promotion of other values, like independence where the high levels of post-election JSG guarantee independence but consequently reduce the levels of judicial accountability.[2]

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[1] Alberto Alemanno, *How Transparent is Transparent Enough?: Balancing Access to Information Against Privacy in European Judicial Selections*, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015) at 204.

[2] Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 225–276 (2017).

Our second core argument is that the differences in reach and form of JSG at the pre and post-election processes strike a careful balance in respecting the separation of powers and the democratic principle. The democratic principle is assured in judicial selection because democratically elected lawmakers are ultimately responsible for the selection of judges with limited advisory input provided by the judiciary. Post-election, judges are able to act independently in office without the risk of undue political influence, ensuring respect for the separation of powers. Caution must be exercised, however, to ensure that any subsequent reforms to JSG practices at the Court continue to strike this very fine balance.

B. Forms of JSG at the European Court of Human Rights

We begin by setting out how JSG operates at the ECtHR, exploring its dual nature, with relatively constrained JSG in judicial selection procedures, combined with strong post-election control over court administration.

I. Election of Judges

The criteria and procedure for the election of judges is set down in Articles 21[3] and 22[4] of the European Convention on Human Rights and Fundamental Freedoms (ECHR) but the Convention provides very basic criteria and a simple political procedure for the appointment of judges. Not only do these Convention articles not hint at any form of JSG, the overall procedure has been described as "excessively vague."[5] Given the lack of significant detail in the Convention itself and in response to sustained criticism by a range of stakeholders concerning the quality of judges selected by PACE,[6] the Council of Europe institutions have implemented a number of reforms with respect to the procedure for appointing its judges. Prior to these reforms the procedure for electing judges to the ECtHR was a three stage political process involving the submission of a list of three candidates by the national governments, scrutiny of this list by an ad-hoc sub-committee of PACE and then a full vote by PACE (see Figure 1).[7] The scrutiny process conducted by the ad hoc sub-

[3] Article 21 sets out the criteria for office, which are short and succinct – 'The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'.

[4] Article 22, which states that 'The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party'.

[5] Koen Lemmens, *(S)electing Judges for Strasbourg A (Dis)appointing Process?, in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015) at 98.

[6] *See*, e.g., Juta Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (2003), http://www.corteidh.or.cr/tablas/32795.pdf.

committee included the opportunity to conduct interviews before making recommendations to PACE on the candidates' suitability. PACE introduced several reforms to the process, beginning around 1996, including the introduction of standard CV formats,[8] recommendations for how the national selection procedure should be conducted[9] and requirements for gender balance in the list of nominated candidates.[10]

The two most significant changes to the selection process, that hinted at a move away from exclusive control of judicial selection by political processes at PACE, took place in 2010 and 2015. The first was the creation of the Advisory Panel of Experts by the Committee of Ministers, the executive arm of the Council of Europe, to assist PACE in the selection of the most qualified candidates. Resolution 2010 (26) establishing the Advisory Panel,[11] notes that the Panel's mandate is to "advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria" set out in both the Convention and in Guidelines issued by the Committee of Ministers with respect to the selection of judges.[12] While much of the election procedure for judges remains the same, the creation of the Advisory Panel introduces an expert pre-screening layer into the procedure, prior to the assessment of the candidates by PACE (see Figure 1). The second significant change was the creation, in 2015, of a permanent Committee on the Election of Judges to the European Court of Human Rights within PACE to replace the ad hoc sub-committee that previously scrutinized the lists and interviewed candidates.[13] We address the rationale and the JSG consequences of each of these reforms below.

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[7] *See* Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights, Information document prepared by the Secretariat, 22 November 2017, http://website-pace.net/documents/1653355/1653736/ProcedureElectionJudges-EN.pdf/e4472144-64bc-4926-928c-47ae9c1ea45e.

[8] Resolution 1082 (1996), Procedure for examining candidatures for the election of judges to the European Court of Human Rights, Parliamentary Assembly of the Council of Europe (1996), http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xNjQ5MyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE2NDkz.

[9] Parliamentary Assembly of the Council of Europe, Recommendation 1429 (1999), National procedures for nominating candidates for election to the European Court of Human Rights, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16755&lang=en.

[10] Parliamentary Assembly of the Council of Europe, Recommendation 1649 (2004), Candidates for the European Court of Human Rights, available at http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17193&lang=en.

[11] Committee of Ministers, Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (2010), http://vm.ee/sites/default/files/content-editors/Res_2010_26_eng.pdf.

[12] *Id.*

[13] *See* Committee on the Election of Judges to the European Court of Human Rights, http://www.assembly.coe.int/nw/xml/AssemblyList/AL-XML2HTML-EN.asp?lang=en&XmlID=Committee-Cdh.

Figure 1

JUDICIAL SELECTION AT THE ECtHR
PRE-REFORM
POST-REFORM
NATIONAL GOVERNMENT SUBMITS LIST OF CANDIDATES
NATIONAL GOVERNMENT SUBMITS LIST OF CANDIDATES
SCRUTINY OF LISTS AND INTERVIEWS WITH CANDIDATES BY AD-HOC SUB-COMMITTEE WITHIN PACE, RECOMMENDATION MADE TO PACE
SCRUTINY OF LIST BY ADVISORY PANEL, RECOMMENDATIONS TO PACE COMMITTEE (2010 ONWARDS)
FULL PLENARY VOTE BY PACE, CANDIDATE ELECTED
SCRUTINY OF LIST AND INTERVIEWS WITH CANDIDATES BY COMMITTEE ON THE ELECTION OF JUDGES TO THE ECtHR, RECOMMENDATIONS TO PACE (2015 ONWARDS)
FULL PLENARY VOTE BY PACE, CANDIDATE ELECTED

1. Advisory Panel

1.1 The rationale

The most significant change, in terms of introducing JSG into the selection of judges, has been the introduction of the Advisory Panel in 2010. The rationale for establishing the Advisory Panel was primarily about ensuring "the quality of the candidates"[14] for election as judges to the Court. The poor quality of judges has sparked public debates in some member states of the Council of Europe as well as amongst domestic apex court judges, in particular in the United Kingdom in the 2000s.[15] In 2003 a report by the NGO Interrights[16] underlined that the Court's authority risked "being undermined by the *ad hoc* and often politicized processes" that were used at that time to appoint its judges.[17] The Court's appointment process was criticized for lacking transparency and accountability, at the national and international level.[18] The Interrights group made a number of recommendations including that the "body making recommendations to the Parliamentary Assembly on the eligibility or suitability of candidates should itself be independent, possess the requisite expertise to fulfil its role, and follow a fair and open procedure."[19]

The Group of Wise Persons, set up in 2005 to examine the long-term efficiency of the control mechanism of the ECHR, took up the idea of an Advisory Panel, in their 2006 Report, as a way of addressing the risk of the ECtHR being "undermined due to the not-always-satisfactory quality of judges."[20] The crucial intervention that officially kick-started the process, however, was a letter from the then President of the Court, Jean-Paul Costa, to the ambassadors of all the Council of Europe States, sent in the lead up to the 2010 Interlaken Declaration.[21] Costa based his call for an Advisory Panel on ensuring that the Strasbourg Court was able to command the respect not only of national judiciaries but also the Court of Justice of the European Union (CJEU) judges, in light of the prospect of the

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[14] Advisory Panel (2013)12EN, Final activity report for the attention of the Committee of Ministers, 11 December 2013, at para. 2. Available at https://dm.coe.int/CED20140017598.

[15] Başak Çalı et al., *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 Human Rights Quarterly 955–984 (2013).

[16] *Supra* note 6.

[17] *Id*. at 3.

[18] *Id.*

[19] *Id.* at 34.

[20] Bilyana Petkova, *Spillovers in Selecting Europe's Judges Will the Criterion of Gender Equality Make it to Luxembourg?*, *in,* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015) at 230.

[21] *Id.* at 230.

EU's accession to the Convention. He wrote that "one of the critical issues in this context will be the future relationship between the Court of Justice of the European Union and the Strasbourg Court. For that relationship to function it must be based on mutual respect."[22] These views were endorsed at the highest political level by the Interlaken Declaration of 19 February 2010, which called on the High Contracting Parties to ensure "full satisfaction of the Convention's criteria for office as a judge of the Court."[23]

The main rationale for the introduction of the Panel, therefore, has been to ensure improved quality control in the election procedure and to tame what has been perceived as an unhealthy politicized election procedure at PACE by injecting expert scrutiny into the election process. Having those with judicial experience themselves more closely involved in this quality control process was seen as a key way of ensuring that the most qualified people were elected to the office. Before examining whether these expectations have been met we will first explain exactly how the Panel functions.

1.2 The Panel's functioning

Prior to the introduction of the Advisory Panel the election of judges was entirely a political process at the domestic, as well as at the European level, with national governments, domestically,[24] and the PACE Parliamentarians (nominated to office by domestic parliaments), supranationally, being the primary decision makers in the process. Since 2010, national governments, before submitting the list of candidates to PACE, are required to send the names and CVs of its candidates to the Advisory Panel. The Panel performs its functions based solely on the CV and any other written documents submitted by governments. If they find that all candidates are suitable and meet the criteria, then they inform the national government. If they find any of the candidates not suitable then they communicate this to the national government which is then invited to offer additional information or new candidates. The Panel provides its views on the candidates to PACE in writing and all of the communications from the Advisory Panel (to the State and to PACE) are kept confidential.

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[22] *Id. See* Letter from Mr. Jean-Paul Costa, President of the European Court of Human Rights, addressed to member states' Permanent Representatives (Ambassadors), 9 June 2010, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12764&lang=en.

[23] High Level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration,* 19. February 2010 at para. 8. Available at http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf.

[24] Although it is worth noting that the process for selecting candidates at the national level varies from country to country with varying degrees of input from judicial peers in the selection process.

The Advisory Panel is composed of seven experts and it must have geographical and gender balance.[25] The Advisory Panel's current Chairperson is a former judge of the Court from Croatia, Nina Vajić and another former ECtHR judge, Paul Mahoney (UK), is also a current member. The remainder of the members are composed of former, and currently serving, judges in apex domestic courts, some of whom also have professorial positions in universities.[26] The composition of the Panel has changed over time in terms of representation of ECtHR judges. In 2010, when the Panel was established, there were three former ECtHR judges as members.[27] This has now reduced to two former ECtHR judges, as noted above. There are no formal targets with regard to the composition of the panel (i.e. the number of ECtHR judges versus national judges or jurisconsults) other than the criteria for geographical and gender balance. There exists, however, a tacit practice in favor of a balanced representation from former Strasbourg judges and national judiciaries.

The members of the Panel are appointed by the Committee of Ministers following consultation with the President of the Court but this consultation is a confidential process and there is no further information available on the appointment process.[28] There is no open public call for members of the Panel and it is unclear how potential names reach the Committee of Ministers although it could be assumed that the Court President takes an active role in identifying suitable members. Alemmano, discussing the influence that the Court's President has on the composition of the Panel notes that it (and the equivalent Panel at the CJEU) "are becoming progressively more expressions of the judiciary than the executive", which "may give rise to some embryonic form of unintended judicial self government."[29]

1.3 Has the Panel altered the political process of judicial selection in practice?

While Advisory Panel recommendations to governments and to PACE are confidential, the Panel issues regular activity reports, which highlight the fact that they rarely accept the initial list of candidates submitted by national governments without at least making additional enquiries. In the Panel's third activity report, published on 30 June 2017, it is noted that they examined 12 lists of candidates in the period 1 January 2016 to 30 June

[25] *Supra* note 11, at para. 2.

[26] Presently, the other members are Lene Pagter Kristensen, Supreme Court (Denmark); Maria Gintowt-Jankowicz, Constitutional Tribunal (Poland); Bernard Stirn, Conseil d'Etat (France) and Associate Professor at Sciences Po, Christoph Grabenwarer, Constitutional Court (Austria) and Professor of Law at the Vienna University of Economic and Business; and Maarten Feteris, Supreme Council (The Netherlands) and Professor of Tax Law at the Erasmus University, Rotterdam.

[27] They were Ms. Renate Jaeger (Germany), Mr. Matti Pellonpää (Finland) and Mr. Luzius Wildhaber (Switzerland).

[28] *Supra* note 11, at para. 3.

[29] *Supra* note 1, at 204.

2017 and concluded that in respect of only two lists were all the candidates suitably qualified.[30] For the remaining ten lists the Panel sought additional information and it notes that "requests for additional information have become the rule rather than the exception."[31]

A central concern of the Panel is the lack of due weight given to its recommendations by national governments. In the early days of the Panel there were examples of states effectively bypassing the Panel altogether by submitting their nominations to the Panel simultaneously as they submitted them to PACE.[32] Mr. Luzius Wildhaber, former judge of the Court, and a former Chairman of the Panel, speaking in 2013, expressed concerns of his own in relation to the functioning of the Panel when he said "my fellow colleagues and I have the impression that, as things stand at the moment, the Panel's opinion is too often either being disregarded or not considered important enough or necessary by some stakeholders in the election procedure."[33] The same complaint was made by another former Chairperson, John Murray, in remarks made at the 1233th meeting of the Ministers' Deputies on 8 July 2015 when he said "the Panel has been deeply concerned that in a number of cases…its opinions seem to have been disregarded…[and] some states appear to have deliberately set out to bring their lists to the Parliamentary Assembly no matter what the Panel says."[34]

The Panel's second activity report published in February 2016 explains that no lists of candidates were transmitted to PACE without first being sent to the Panel in 2014-15 suggesting that this problem may have been addressed.[35] The Panel notes in its third activity report, in 2017, that in three cases candidates were maintained on national government lists submitted to PACE "despite the Panel's negative views on one or more of the candidates."[36] This observation that some national governments submitted lists to

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[30] Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, *Third activity report for the attention of the Committee of Ministers*, 30 June 2017 at para. 50. Available at https://rm.coe.int/en-3rd-activity-report/168074f0ad.

[31] *Id.* at para. 51.

[32] Lemmens *supra* note 5, at 106.

[33] Steering Committee for Human Rights, *Ministers' Deputies Exchange of Views with Mr. Luzius Wildhaber, Chairman of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights,* DH-GDR (2013) 005, 5 February 2013, as quoted in Lemmens *supra* note 5, at 106.

[34] Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, *Second activity report for the attention of the Committee of Ministers*, 25 February 2016, at 18. Available at https://rm.coe.int/168066db65.

[35] *Id.* at para. 49.

[36] *Supra* note 30, at para. 53.

PACE despite negative opinions on certain candidates' suitability by the Panel are demonstrative of continuing concerns with respect to the Panel's effectiveness and provide an example of how it has failed to meet expectations with regard to injecting judicial considerations into the deeply political process of electing judges. Despite this lack of respect for the Panel's recommendations, the Council of Europe's Steering Committee for Human Rights (CDDH), in its 2017 report, refused proposals to make the Panel's recommendations binding on member states and highlighted the expert and the advisory role of the panel.[37] This is reflected in the recent Copenhagen Declaration where the importance of cooperation with the Panel is stressed, however, States Parties are only encouraged to "give appropriate weight" to negative views from the Panel.[38]

Despite the fact that their decisions are not binding, the Panel appears to be of the opinion that its work is having a positive impact on the quality of candidates being proposed by national governments. It notes that, since it was created, it has examined 46 lists of candidates and "based on this unique experience, the Panel is satisfied in broad terms, that the quality of candidates that have come forward has improved, as least in part, because of the existence of the Panel."[39] The activity reports of the Advisory Panel certainly point to an emergence of standardized expectations with regard to the skills and experience of judge candidates with the Panel providing detailed accounts of what they look for in terms of candidates' prior work experience.[40] The Panel, while respecting that its advice is not legally binding, nevertheless urges PACE to follow its advice and not to accept lists of candidates that include individuals that the Panel believe to be unsuitable.[41] Given the rise in the rejection of the lists of candidates by the PACE Committee in recent years based on the inadequacy of the CVs of candidates submitted,[42] it may be speculated that the analysis carried out by the Advisory Panel has had important consequences for these rejections.

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[37] Steering Committee for Human Rights, Committee of Experts on the System of the European Convention on Human Rights, *Report on the process of selection and election of judges of the European Court of Human Rights*, DH-SYSC(2017) R4 Addendum, 10 November 2017 at para. 84. Available at https://rm.coe.int/-draft-report-on-the-process-of-selection-and-election-of-judges-of-th/1680767b5a.

[38] The Copenhagen Declaration on the reform of the European Convention on Human Rights system, 12–13 April 2018, available at https://www.coe.int/bs/web/portal/-/copenhagen-declaration-adopt-1, at para. 61.

[39] *Supra* note 30, at para. 58.

[40] *See* activity reports of the Panel, *supra* notes 30 and 34.

[41] *See* John Murray's comments to 1233th meeting of Ministers' Deputies on 8 July 2015, *supra* note 34, at p.18.

[42] In the last year alone, the PACE Committee rejected the full list of candidates from Albania, Georgia and Turkey two times in a row. *See Election of Judges to the European Court of Human Rights – tables of progress by Contracting Party,* http://website-pace.net/documents/1653355/1653736/TableForthcomingJudgesElections-EN.pdf/775de55c-67b8-4f46-befd-1063dca1b5e0.

2. The PACE Committee on the Election of Judges to the European Court of Human Rights

The concerns about the unhealthy political nature of the judicial selection process in the last decade also led to the creation of the PACE Committee on the Election of Judges to the European Court of Human Rights in January 2015.[43] This Committee, composed of twenty parliamentarians, is responsible for reviewing the Panel's views, most crucially, interviewing candidates in person, and conducting its own scrutiny of candidates' experience and qualifications before making its recommendations on suitability to the PACE Plenary. Prior to the reforms, this function was performed by an *ad-hoc* Sub-Committee within PACE, which was formed without any expectation that the members had legal knowledge relevant to the ECtHR. The Sub-Committee was explicitly criticized for not having the relevant knowledge and experience to assess the candidate's knowledge of human rights law as it was made up of parliamentarians and not legal experts.[44] The reforms to the PACE committee addresses these concerns.

First, the Committee was upgraded from being an *ad-hoc* Sub-Committee to a standing Committee. Second, the members of this Committee are now expected to have some kind of legal experience.[45] The upgrading of the *ad-hoc* Sub-Committee to a full Committee was a significant move as it increased the legitimacy and 'soft power' of the Committee and also raised its visibility within PACE and the Council of Europe more generally. It is also expected that the legal knowledge of its members would allow for a more rigorous interview process. Criticisms have been made, however, of the decision to have a smaller and legally specialized Committee because of the difficulty in achieving "an equitable geographical distribution" and the CDDH, in its 2017 review, suggests that the composition of the Committee should be re-examined because the limited number of Committee members and lack of geographical diversity may impact on the "democratic legitimacy of the process."[46] In the same review, the CCDH rejected proposals for the Advisory Panel to interview candidates prior to the interviews by the PACE Committee. It did, however, respond favorably to the suggestion that Panel members be physically present at the Committee meetings so that they can better explain their views to the Committee members.[47] If these reforms are taken up, the JSG element in the selection of judges would be strengthened further, again in the form of soft power. Whether the PACE Committee

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[43] *Supra* note 37, at para. 103. *See* Parliamentary Assembly Council of Europe, Resolution 2002 (2014), *Evaluation of the implementation of the reform of the Parliamentary Assembly*, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21049&lang=en.

[44] *Supra* note 6, at 25–26.

[45] *Supra* note 37, at para. 104. *See* also Andrew Drzemczewski, *The Parliamentary Assembly's Committee on the Election of Judges to the European Court of Human Rights,* 35 Human Rights Law Journal, 269–274 (2015).

[46] *Supra* note 37, at para. 120.

[47] *Id*. at paras 94–97.

recommends the three candidates to the PACE Plenary and which one of these is ultimately elected, however, remain political decisions.

II. Court Administration

While JSG in the judicial selection process is constrained, once elected the judges of the ECtHR have strong formal powers with regard to the day to day functioning of the Court. The Rules of Court are created, adopted and amended by the Court itself. The judges are also responsible for the election of their peers to official, and powerful, offices within the Court. The election of judges to the positions of President and Vice-President of both the Courts and the Sections is undertaken by the full plenary Court by way of secret ballot.[48] The President's powers and functions are expressed very broadly in the Rules of the Court as being to "direct the work and administration of the Court."[49] The President has assistance in this regard from the Bureau, which is made up of the President of the Court, the Vice-Presidents of the Court and the Section Presidents. The Bureau assists the President in his or her function of directing the work of the Court and the President can submit to the Bureau "any administrative or extra-judicial matter which falls within his or her competence."[50]

The judges acting as a plenary Court are also responsible for the election of the Court's Registrars and Deputy Registrars.[51] One of these Registrars acts as the Jurisconsult whose job is to monitor the quality and consistency of the Court's jurisprudence with a team of registry lawyers.[52] Registry lawyers, working for the Juriconsult, review the draft judgments and decisions of the Court, paying "particular attention to drafts that apply the case law to new situations, or propose to develop the case law in a particular direction" and then report on this to the Jurisconsult.[53] Based on these reports the Jurisconsult's office writes a case law update to all the Judges and Registrars, including warning "against discrepancies or omissions of jurisprudence."[54] When the Jurisconsult "considers that there is a potential

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[48] European Court of Human Rights, *Rules of Court*, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf at Rule 8.

[49] *Id.* at Rule 9.

[50] *Id.* at Rule 9A.

[51] *Id.* at Rules 15 and 16.

[52] *Id.* at Rule 18B. *See* also Vincent Berger, *Jurisconsult of the Court (2006 – 2013),* http://www.berger-avocat.eu/en/echr/jurisconsult.html

[53]John Paul Costa, Speech at Zagreb University, 30 March 2009, https://www.usud.hr/sites/default/files/dokumenti/President_Costas_Speech_given_at_the_Zagreb_Faculty_of_Law_on_30_May_2009.pdf at p.3.

[54] Berger, *supra* note 52.

conflict or divergence on the cards" this will be communicated to the relevant Section(s).[55] As well as assisting the President, the Bureau also facilitates communication between the different Sections of the Court, which "provides an evident opportunity to identify and possibly correct potential conflicts,"[56] presumably with reference to the Jurisconsult's analysis.

In terms of court administration, therefore, the most powerful actors are the President and the Section Presidents. The President's power lies in their formal authority to wield power over the Registrar and the staff of the Court, their powers to decide on the third party interventions that may be allowed, and their power to appoint Single Judges under Rule 27A of the Rules of Court.[57] The President alongside the Vice-Presidents, the Section Presidents and the national judge are also automatically part of Grand Chamber formations, together with other judges selected by the drawing of lots. Alongside these formal powers the President has informal influence as a power broker between the different Sections of the Court with regard to referrals of cases to the Grand Chamber and as a "judicial diplomat" concerning the choice of cases to be identified as pilot judgments. The power of the President in an informal sense undoubtedly depends on the style of leadership of the President and the extent to which they delegate to the Registrar with regard to everyday judicial policy decisions. Section Presidents, too, are powerful actors. Once elected, Section Presidents are able to exercise important forms of judicial power in deciding the everyday management of cases in terms of prioritization. If the cases from the Sections are not brought before the Grand Chamber, the decisions of Sections are final and thus enable Sections to operate autonomously from one another. Alongside these, single judges are important actors in the ECtHR system due to the delegated powers they enjoy as part of single judge formations to dismiss manifestly unfounded cases.

The informal power of the Registry of the ECtHR as part of its JSG has been subject to much speculation. In anonymous and confidential interviews with past judges of the ECtHR, for example, some judges highlighted the informal power of the members of the Registry over the judicial processes.[58] Interviews with members of the Registry also underlined very strong forms of hierarchy within the Registry and that if informal power was exercised by the Registry, this would be vested with a few top ranking members rather than the Registry

[55] Costa, *supra* note 53, at 3.

[56] Erik Fribergh & Roderick Liddell, *The Interlaken Process and the Jurisconsult,* http://www.berger-avocat.eu/the_interlaken_process_and_jurisconsult.pdf, at 184.

[57] *See* List of Single Judges appointed by the President under Rule 27A of the Rules of Court, 1 February 2017, http://echr.coe.int/Documents/List_single_judges_BIL.pdf.

[58] Interviews conducted by the first author as part of her study on 'The Legitimacy and Authority of Supranational Human Rights Courts' (2008 – 2011). *See* https://ecthrproject.wordpress.com/research-output/.

lawyers individually.[59] The informal power of the Registry is difficult to trace due to the confidential nature of the deliberations at the Court and the changing dynamics between the Presidents and the Registry over time. Although much remains unknown about the precise everyday ways in which JSG operates in the running of the Strasbourg Court there can be no doubt that the judges enjoy high levels of control over the administration of its judicial activities. Having set out how JSG operates at the ECtHR the following section analyses how these practices interact with a range of core values.

C. What values do JSG practices at the ECtHR promote or hinder?

It is argued that JSG, depending on its form, rationale and reach can have a diverse range of impacts on different values and our focus in this article is to explore the values of independence, transparency, accountability, and legitimacy.[60] Dunoff and Pollack, in their study of the institutional design of international courts, argue that they face a "judicial trilemma" and are only able to prioritize two out of the three values of independence, accountability and transparency.[61] According to their work, the design of the Strasbourg Court, as a whole, prioritizes independence and transparency at the expense of accountability.[62] For example, the high levels of judicial independence at the ECtHR, facilitated through strong post-election JSG and other features like the non-renewable term, necessarily results in a trade-off with regard to judicial accountability, as once elected, judges are subject to very limited control. If the levels of judicial accountability at the ECtHR were increased, for example, through the re-introduction of renewable terms or through stronger Executive oversight of judicial activities then this would limit independence as judges may then be subject to political influence. If the Court wanted to prioritize *both* accountability and independence then transparency may be affected, for example, through the use of *per curium* decisions where individual judges are not identified, as is current practice at the CJEU.[63]

In what follows, we hold that JSG practices and reforms at the ECtHR, do indeed boost the values of judicial independence at the expense of accountability but we hold that the position with regard to transparency is more complex than the picture painted by the "judicial trilemma". We also argue that JSG reforms at the Court promote the value of

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[59] *Id.*

[60] These core values were selected by the JUDI-ARCH research team as being key to exploring the effects of JSG. *See* David Kosar's introduction to this Special Issue, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe'.

[61] *Supra* note 2.

[62] *Id*. at 249.

[63] *Id.* at 238.

legitimacy and note that legitimacy concerns were one of the primary driving forces behind moves to increase levels of JSG at Strasbourg, particularly with regard to judicial selection.

I. JSG as a promoter of Judicial Independence

JSG, in particular post-election, strongly favors *de facto* and *de jure* independence of the Strasbourg judges. The introduction of the Advisory Panel, as discussed above, was a key reform to improve the quality of the short listed judges, but also to reduce the potential for political appointments to the Court, which are seen as a key threat to the Court's independence. There have, however, been several additional reforms at the Court that have attempted to improve the *de jure* independence of the ECtHR judiciary. The introduction of a single term of nine years for ECtHR judges, by way of Protocol No14 (May 2004),[64] was a crucial intervention in attempting to secure greater judicial independence by freeing the judges from re-election concerns. Prior to this change judges could be re-nominated by their national governments, which arguably created an incentive for them "to please their governments in order to secure their re-nomination."[65] This change eliminated that possibility although created another potential conflict for judges who, depending on their age at appointment, may now need to re-integrate into the national judicial system at the end of their term and so may remain at the mercy of their national governments for future career prospects in their national settings.

This new challenge, created by the introduction of the nine year term, was later addressed by way of Resolution 1914 (2013).[66] This resolution sought to "strengthen legal guarantees of independence of the Court's judges" by calling on State parties to do a number of things including giving judges and their families diplomatic immunity for life, providing judges with a similar judicial position in the national judiciary at the end of their Strasbourg term (if they are not at retirement age), including their term at the ECtHR in national employment records, and providing them with a suitable pension, equivalent to that of judges in the highest national courts, on retirement. These recommendations were designed to enhance independence by reducing the judge's reliance on the goodwill of their national government when their term on the court ends. As the Court itself said "there is a real risk that uncertainty regarding their professional and judicial prospects following the completion of their term of office at the Court will have negative

[64] Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, http://www.echr.coe.int/Documents/Library_CollectionP14_ETS194E_ENG.pdf.

[65] David Kosar, *Selecting Strasbourg Judges: A Critique*, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 127 (Michal Bobek ed,, 2015).

[66] Parliamentary Assembly Council of Europe, Resolution 1914 (2013), *Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties*, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19396&lang=en.

repercussions for its perceived independence and for the attractiveness of the post of judge to possible candidates."[67] This highlights that whilst a single nine year term does address judges' strategic decision making with a view to re-election, it does not address the subsequent development of the career of the judges once they return back to their home countries. Thus, there is indeed a possibility that judges with post ECtHR job security concerns may act cautiously in order not to jeopardize their career development.

In terms of *de facto* judicial independence, the ECtHR judges enjoy substantial control and independence over the internal workings of the Court. The power of the Committee of Ministers to set the budget of the Court has important consequences for the hiring of lawyers and support staff and thus inadequate funding would hinder the effectiveness of JSG but the Committee of Ministers does not have any formal influence on court administration. The 2015 Committee of Ministers report on the Long Term Future of the European Court of Human Rights confirms that the Court must be supported and its authority not interfered with.[68]

JSG practices further allow for individual judges of the Court to enjoy high levels of internal independence on the Strasbourg bench. Each judge is able to reach their own decision in cases and can issue separate concurring or dissenting opinions without restriction in terms of content or length. The workings of the Jurisconsult and the Registry, in general, is rarely discussed or explored publicly, but formally judges are free to discard the recommendations made by the Jurisconsult in their deliberations. It could, however, also be argued that the introduction of the non-renewable term may have further empowered the Registry and the Jurisconsult as they are now the primary holders of longer term institutional memory. In a recent speech on the future of the ECtHR, currently serving Judge Albuquerque proposed that to improve judicial independence at Strasbourg that there should be a prohibition on judges moving to the Registry or Registry staff joining the bench for five years after their primary position ends, which is perhaps indicative of the informal power exercised by the Registry.[69]

In terms of the independence of the Court's judicial output Voeten concluded, in an empirical study of dissenting judgments at the ECtHR from 1960 to 2006, that while national judges tended to display some bias towards their national government in cases

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[67] European Court of Human Rights, *Contribution from the Court regarding certain issues under consideration as part of the follow-up to the report of the CDDH on the longer-term future of the Convention system*, 23 February 2017 at para 30. Available at https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/168071442e.

[68] Steering Committee for Human Rights (CDDH), *CDDH Report* on *the long term future of the system of the European Court of Human Rights* (2015), available at https://rm.coe.int/1680654d5f.

[69] Alison Donald & Phillip Leach, '3 steps to save the European Court of Human Rights', January 16 2018, available at https://mdxminds.com/2018/01/16/how-to-save-the-european-court-of-human-rights-in-3-steps/.

relating to Article 3 "in the vast majority of cases national judges vote with the non-national judges, suggesting a good amount of independence."[70] He also noted that there is "no sustained evidence that judges were systematically beholden to their national governments on votes where national governments were not the respondent governments"[71] suggesting that judges are not "systematically motivated by geopolitics."[72] Voeten's article thus supports the thesis that strong post-election JSG practices are in congruence with judicial independence.

Despite the lack of empirical evidence that the Strasbourg judges acted in politically motivated ways, the diversity in quality and rigor of the national selection procedures has been framed as a continuing risk to the judicial independence of the ECtHR, even if this is more perceptual than practical. Lemmens, for example, notes that "the Council of Europe has to accept that states enjoy a wide discretion when it comes to establishing a list of three candidates"[73] and as such, the discretion that national governments have with regard to their national selection procedures presents a continuing threat to the judicial independence at the ECtHR.[74] In offsetting this perceived threat, the Committee of Ministers sets down guidelines [75] with regard to how the national selection procedure should be conducted. These guidelines contain detailed recommendations for the conduct of national selections, emphasizing openness and transparency. States are also required, when submitting the names of candidates to PACE, to describe the process used to select candidates.[76] PACE has also formally resolved to reject lists of candidates when they have been compiled "in the absence of a fair, transparent and consistent national selection procedure."[77] In October 2016, for example, it rejected the list of candidates provided by

[70] Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 American Political Science Review 417–433 (2008) at 426.

[71] *Id.* at 429.

[72] *Id.* at 431.

[73] Lemmens *supra* note 5, at 108.

[74] *See* Lemmens *supra* note 5, at 109–117 for a comparative description of the French, Belgian and British national selection process in 2012.

[75] Committee of Ministers, Resolution 2012 (40), *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*, 28 March 2012, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cb1ac.

[76] Parliamentary Assembly of the Council of Europe, Resolution 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights,* 27 January 2009, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17704&lang=en.

[77] *Id.*

Albania and Hungary because of insufficient national selections procedures.[78] There remains, however, significant variation between countries with regard to how they conduct these.[79]

II. JSG and Transparency: A mixed record

Alongside independence, transparency is the second value that, according to Dunoff and Pollack, is prioritized in the institutional design of the Strasbourg Court.[80] Their conceptualization of transparency, however, centers narrowly on judicial decision-making.[81] The fact that the names of the judges are published on all ECtHR decisions and judges are able to issue separate concurring or dissenting judgements is said to demonstrate a high degree of transparency. When considered in light of the totality of JSG practices at Strasbourg, we find that the effect of JSG in promoting transparency is more complex.

1. Transparency and the Advisory Panel

The introduction of the Advisory Panel to the judicial selection process seeks to improve the quality of judge candidates to Strasbourg, but the procedures of the Panel itself are not, and perhaps, cannot be, transparent. The work of the Panel is confidential and the Panel shares its findings only with the nominating state and PACE. For some, this raises the question of "who guards the guardians."[82] The commitment to confidentiality in the work of the Panel is justified on the basis of the candidates' privacy and the advisory nature of the Panel's role. Some, however, challenge the argument around candidates' privacy and reputation by noting that the existing system already creates the potential, perhaps even greater potential, to impact on a candidate's reputation as their names are made public at the nomination stage and then if they are not selected (or outright rejected) this leads to a significant deal of gossip and speculation about the reasons why. Alemmano notes, therefore, that "one may…contend that the current policy seems more effective in

[78] Parliamentary Assembly Council of Europe, *Election of Judges to the European Court of Human Rights: Progress Report*, 6 October 2016, http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzAzOCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIzMDM4.

[79] *Supra* note 74. *See* also Open Society Foundations, Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners, 2017, available at https://www.icj.org/wp-content/uploads/2017/11/Universal-Strengthening-from-Within-Publications-Reports-2017-ENG.pdf.

[80] *Supra* note 2.

[81] *Supra* note 2, at 226: "…specifically mechanisms that permit the identification of individual judicial positions, primarily through the publication of separate votes or opinions."

[82] *Supra* note 1, at 212.

protecting the panels' operation from public scrutiny than the candidates' reputation."[83] In response to this concern, he proposes greater transparency and argues that "transmission [of the Panel's opinions] to all Council of Europe contracting parties could provide this entity more teeth and help it gain more respect form all governments."[84] Greater transparency, it is argued, may also improve the panel's effectiveness "through strategic use of, *inter alia,* 'peer pressure' and 'name and shame' mechanisms."[85] Furthermore, he argues that all opinions should be disclosed publicly after the nomination procedure, which he argues might lead to an increase in the court's legitimacy.

The CCDH prepared a report into the functioning of the Advisory Panel in 2013.[86] In terms of confidentiality specifically the CCDH notes its preference to keep the rules on confidentiality as they are and this position was affirmed in its most recent 2017 report.[87] While transparency is an important value in matters related to the functioning of the Court, we think caution must be exercised in making the Advisory Panel's process and recommendations fully transparent. It is noted in several of the Panel's activity reports that, for whatever reason, there is a lack of candidates applying to be judges at the Court with high level judicial experience.[88] A completely transparent review process by the Panel, like that favored by Alemmano, may create yet another disincentive for suitably qualified and experienced candidates to apply. It is also unclear whether naming and shaming would adequately work to improve the quality of judges nominated by governments.

2. Court Administration and Transparency

While the output of Strasbourg judges is highly transparent information on how they work behind the scenes is much less clear. Very basic information about judges is available, for example, details of the salaries paid to judges are available online and a basic CV is published on the Court's website.[89] The internal workings of the Court, however, are less transparent and while we know that judges enjoy significant powers of JSG in the inner functioning of the court we know much less about *how* these powers are used.

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[83] *Id.* at 215.

[84] *Id.*

[85] *Id.* at 218.

[86] Steering Committee for Human Rights (CDDH), *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights,* 29 November 2013, available at https://rm.coe.int/168045fe14.

[87] *Id.* at para. 59. *See* also *supra* note 37, at para. 97.

[88] *See*, e.g. *supra* note 30, at 41 and *supra* note 34, at para. 42.

[89] *See* Judges of the Court*,* http://echr.coe.int/Pages/home.aspx?p=court/judges&c=.

In Judge Albuquerque's recent intervention, in a public talk at Middlesex University, his proposals to help bolster the Court's legitimacy and authority, included several related to transparency.[90] These suggested reforms highlight the lack of transparency in the operation of certain JSG functions at the ECtHR and specific proposals included the use of objective and transparent criteria and procedure to determine the composition of each Chamber and the Grand Chamber.[91] Chambers are currently set up by the Plenary Court based on proposals emanating from the Court President[92] and the Grand Chamber is created partially through the drawing of lots, with the Plenary Court deciding on the "modalities for drawing lots."[93] Judge Albuquerque's proposals also highlight the lack of transparency related to the involvement of the Jurisconsult and the Registry in the Court's judicial decision-making and he proposes that all sources of information relied on by the Court be made public, including that provided by the Jurisconsult.[94] These proposals should be welcomed as a way to make the operation of JSG at the Strasbourg Court more transparent, which, as Judge Albuquerque suggests, will have a positive impact on the Court's overall authority amongst its stakeholders, especially domestic parliaments and apex courts.

III. Accountability

Accountability is the value that, according to Dunoff and Pollack's theory is sacrificed in the design of the Strasbourg Court in favor of high levels of judicial independence and transparency.[95] The core focus of most scholarship and policy debates has been on the accountability of the Court as such rather than the accountability of individual judges. As part of the stocktaking exercise with respect to the 'Long term future of the European Court of Human Rights' that was started in the aftermath of the Brighton Declaration, a number of proposals have been made to address the accountability gap at Strasbourg in particular with respect to making the ECtHR more responsive to judgments of domestic supreme courts.[96] Our focus, below, however, is to examine the accountability of judges more at the individual level, looking both at external and internal mechanisms.

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[90] *Supra* note 69.

[91] *Id.*

[92] *Supra* note 48, at Rules 25 and 26.

[93] *Id*. at Rule 24e.

[94] *Supra* note 68.

[95] *Supra* note 2.

[96] *Supra* note 67.

1. External Accountability

As noted previously, the introduction of the single term precludes the possibility that judges can be held accountable by States or by PACE through re-nomination procedures. It is also worth noting that the dismissal of judges is also a pure form of JSG as, according to Rule 7 of the Court's Rules, judges can only be dismissed from office based on a two-thirds majority of the other judges who believe that "he or she has ceased to fulfil the required conditions."[97] Furthermore, the dismissal procedure can be "set in motion" by any judge on the Court.[98] The rule that judges can only be dismissed by a majority vote of fellow judges, never practiced to this date, also points to the lack of powers by States or the Council of Europe as a whole to hold judges to account individually.

Despite the general lack of external accountability mechanisms, it could be argued that individual judges can be held accountable by way of naming and shaming tactics undertaken by external actors, for example, NGOs, commentators on Strasbourg jurisprudence, domestic supreme courts, parliaments and the executive. In the 2017 decision of *Bayev and Others v Russia,*[99] the dissenting judgment by Russian Judge Dedov, for example, has been analyzed as containing "outrageously homophobic statements that are unworthy of a judge at the European Court of Human Rights" including attempts to draw links between homosexuality and pedophilia.[100] In a commentary piece on the Strasbourg Observers site (a widely read blog post by followers of the ECtHR) questions were asked about whether Judge Dedov's comments in this case call into question his ability to meet the condition set down in Article 21 of the Convention to be of "high moral character" and there is a suggestion that he may have abused his position as a judge "to spread discriminatory discourse."[101]

Interestingly, in the commentary piece it is noted that "it is for the Parliamentary Assembly to avoid electing persons with such attitudes to the post of judge at the European Court" suggesting that once judges are elected to the position it is extremely difficult to discipline or remove them.[102] While the Strasbourg Observers have vowed to "keep an eye on" Judge Dedov it is unclear how this form of public naming and shaming would impact on any

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[97] *Supra* note 48, at Rule 7.

[98] *Id.*

[99] Bayev and others v. Russia, App No. 67667, [2017] ECHR 572 (20 June 2017).

[100] Laurens Lavrysen, *Bayev and Others v. Russia: on Judge Dedov's outrageously homophobic dissent,* Strasbourg Observers, 13 July 2017, https://strasbourgobservers.com/2017/07/13/bayev-and-others-v-russia-on-judge-dedovs-outrageously-homophobic-dissent/.

[101] *Id.*

[102] *Id.*

judge's conduct.[103] While we accept that the Court has several stakeholders, some of whom may be content with Judge Dedov's comments, we do think it is important to note that the high levels of independence and relatively low levels of accountability can lead to the situation where a judge on a human rights court espouses views in a decision that constitute discriminatory discourse against a marginalized group.

2. Internal Accountability

Given the general lack of external accountability mechanisms it could be argued that once elected, the accountability of the judges of the ECtHR becomes exclusively a matter of JSG. There are several internal accountability mechanisms at work in Strasbourg, all controlled by judges themselves. Internal judicial accountability for the decisions of Chambers are ensured with the possibility of referring a Chamber Judgment within three months of its delivery to the Grand Chamber. The Panel of the Grand Chamber decides on whether to accept requests for referral by applying certain criteria, which is set out in detail in guidance published by the Court.[104] While there is an internal review mechanism with regard to Chamber judgements, there is no equivalent with respect to decisions of single judge formations when cases are declared inadmissible on the grounds that they are manifestly ill founded. In 2016, the Court registered 53,500 new applications of which more than 50% (27,300) "were identified as Single-Judge cases likely to be declared inadmissible."[105] This demonstrates the extent of single judge formation decisions, for which there is currently no accountability.

Another very 'soft' internal accountability mechanism is the Resolution on Judicial Ethics, which was adopted by the Court in 2008 and sets out some very general provisions on how judges should behave during their time on the bench.[106] The Resolution is focused on enhancing public confidence in the Strasbourg bench by ensuring that judges do not act to compromise their independence and impartiality. It imposes very general and broad requirements, for example, that "judges shall perform the duties of their office diligently" and "shall exercise the utmost discretion in relation to secret or confidential information."[107] There are, however, no further accountability mechanisms detailed in the Resolution if judges fail to meet these requirements.

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[103] *Id.*

[104] European Court of Human Rights, The general practice followed by the panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention, http://echr.coe.int/Documents/Note_GC_ENG.pdf.

[105] European Court of Human Rights, Analysis of Statistics 2016, http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf.

[106] European Court of Human Rights, Resolution on Judicial Ethics, 23 June 2008, http://www.echr.coe.int/Documents/Resolution_ Judicial_Ethics_ENG.pdf.

[107] *Id.* at IV. and V.

While this Resolution imposes certain standards for judicial behavior the Court's Rules of Procedure contain no formal disciplinary procedure for judges related to their non-judicial conduct. The Rules of the Court provides only the possibility for the dismissal of a judge but there is no detail on the precise procedure required if this process were started other than the fact that the ultimate decision to dismiss has to be taken by a majority of two-thirds of the elected judges. The taking of disciplinary proceedings against judges is also a sensitive matter as it, of course, has the potential to impact on the other value of judicial independence.

In terms of external non-judicial behavior all judges at the ECtHR enjoy diplomatic immunity although this can be waived by the Court at the request of a judge's national government. The diplomatic immunity also extends to the spouse and children of the judge as was observed in a recent case involving the wife of the former Romanian judge on the Court who was being investigated for corruption.[108] The ECtHR emphasized strongly that diplomatic immunity for judges and their families must be respected and that there is a procedure for requesting a waiver of immunity, which must be followed.[109]

It appears, based on our examination, that Dunoff and Pollack's theory on the Judicial Trilemma is largely borne out when explored specifically through the lens of JSG at the ECtHR, although, as we noted in the section on transparency, their theory does rest on particular understandings of the different values, which remain contingent and subjective concepts.[110] While legitimacy was a value not addressed in Dunoff and Pollack's theorization of the Judicial Trilemma we believe that it warrants attention of its own, primarily because it was one of the principal reasons used to justify the JSG reforms at the Court, particularly with regard to judicial selection.

IV. Legitimacy

In their grounded empirical study of the legitimacy of the ECtHR, Çali, et al. note that differently situated actors (judges, lawyers and politicians) in different domestic contexts vary in their "legitimacy constructions" of the Court and also in the conditions that would lead to "legitimacy erosion."[111] The legitimacy concerns tied to the ECtHR have both input

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[108] Valentina Pop, *Strasbourg backs Romanian judge in jewellery-for-verdicts case*, EU Observer, 20 October 2011, https://euobserver.com/justice/114006.

[109] *Id.*

[110] For a response to Dunoff and Pollack's *Judicial Trilemma* and a differing perspective on the value of judicial independence, *see* Helen Keller & Severin Meier, *Independence and Impartiality in the Judicial Trilemma,* 111 AJIL Unbound 344–348 (2017).

[111] Çali et al., *supra* note 15, at 969.

and output oriented dimensions, raising not only concerns about judicial selection procedures, but also about the kinds of judgments delivered by the Court, regardless of who the judges are. In their study, Çali et al. find that the quality of judges at Strasbourg (input legitimacy) was a key concern expressed by their interviewees particularly amongst apex courts in the UK, Ireland and Germany.[112] In the recent Copenhagen Declaration the quality of judicial selection is also framed as a legitimacy concern.[113] This concern with respect to the quality of judges and the need to attract the respect of domestic apex court judges also corresponds closely with the rationales for the introduction of some of the JSG practices, particularly the Advisory Panel and the recent reforms aiming to introduce expertise into the PACE Committee. In the first activity report issued by the Advisory Panel its creation was indeed directly tied to legitimacy concerns:

> The legitimacy of the Court as a judicial institution in the eyes of national institutions, Governments and supreme or constitutional courts is vital to the continuing effectiveness of the system based on the European Convention on Human Rights ("the Convention"), and the respect for the integrity and quality of the Court's judgements at national level. For the foregoing reasons it is crucial that candidates presented for election to the Court are persons of high standing with all the special professional qualities necessary for the exercise of judicial function as a judge of an international court whose decisions have such an impact in all High Contracting Parties.[114]

These legitimacy considerations have also led the Panel, in its subsequent activity reports, to express concerns about the candidates that they are assessing, in particular, about their lack of judicial experience in higher courts and the Panel's view appears to be that these legitimacy concerns are best addressed by electing candidates specifically with lengthy judicial experience.[115] This focus on judicial experience in the Panel's published reports is perhaps not surprising given that the Panel itself is made up exclusively of high level judges. While the Convention does create the possibility for "Jurists of recognized competence" to be elected as judges, and the Panel sets out its view on how this should be

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[112] *Id.* at 970–971.

[113] *See supra* note 38, at para. 55.

[114] Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, *Final activity report for the attention of the Committee of Ministers*, 11 December 2013 at para. 1. Available at https://dm.coe.int/CED20140017598.

[115] *Supra* note 88.

assessed, there appears to be a preference for candidates with judicial experience given the frequent references to the Panel's disappointment at the lack of candidates with "substantial judicial experience, particularly in the highest courts."[116] The former Chair of the Panel, John Murray, notes that there is "a very high proportion of candidates who are just qualified."[117] These candidates may be "very fine lawyers of good standing" but are lacking "the degree of experience, of long or mature experience, at a high-level which gives them the qualities necessary for the exercise of judicial function at the level of a court such as the European Court of Human Rights."[118]

The propensity for governments to propose 'just qualified' candidates is seen as a key threat to the Court's legitimacy where "the real danger is that the Court could be perceived as a committee of experts rather than a judicial body, which would undermine its credibility."[119] This point is emphasized by the Panel and in its latest activity report it is argued that electing judges to the Court who have high level judicial experience in Member States "obviously will have positive repercussions for the reputation of the Court."[120] This demonstrates that the implementation of a JSG practice like the Advisory Panel, while it may have had some positive impacts, is only able to effect change within the limits of the caliber of candidates that are proposed. It is not necessarily the case that national governments are preventing high level judges from applying but rather that, for whatever reasons, such candidates appear not to be attracted to applying, which the Panel acknowledges in its reports.

The view that senior domestic judges on the bench of the ECtHR would improve the legitimacy of the Court also finds support in quantitative studies on compliance with the judgments of the Court. Voeten, for example, proposes that having more judges with judicial experience may lead to greater compliance of its judgements.[121] To evaluate the links between compliance and judicial experience Voeten uses the length of time between the issuing of the judgment and the adoption of a final resolution by the Committee of Ministers as the key variable and compares this to "the proportion of the ECtHR panel (chamber) whose former career was primarily that of a judge."[122] His results suggest that

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[116] *Supra* note 30, at para. 41.

[117] *Supra* note 34, at p.17.

[118] *Id.*

[119] *Id.*

[120] *Supra* note 30, at para. 34.

[121] Erik Voeten, *Does a Professional Judiciary Induce More Compliance?: Evidence from the European Court of Human Rights,* available on SSRN <ssrn.com/abstract=2029786>.

[122] *Id.* at 9 and 12.

judgments written by panels with former judges are implemented more quickly.[123] While Voeten explores various hypotheses on why judgements written by professional judges are more likely to be implemented he is unable to draw any firm causal conclusions.[124]

The "judicialisation" of the ECtHR bench, however, also gives rise to output legitimacy concerns.[125] Madsen, for example, holds that career judges are less equipped to navigate the complex interactions between human rights law and international politics and tailor their judgments to the contemporary political contexts. He goes on to argue that "success as an international court very often requires a dose of diplomacy", which is "somehow lost in Strasbourg now"[126] and that "the current procedures for attracting new judges do not seem to strike a good balance between specialized law and an appreciation of the inherently political nature of human rights."[127] This discussion points to the tensions between different perspectives on the legitimacy of the ECtHR. Whilst in the eyes of some, the increase in experienced judges enhances the legitimacy of the ECtHR and increases compliance rates with its judgments, in the eyes of others, the over judicialisation of the bench may risk severing the progressive development of human rights as a moral and political project and create a legally conservative court unable to face the contemporary human rights challenges in Europe.

Beyond judicial selection, legitimacy concerns are also expressed with regard to the judicial activities of the judges and the Court as a whole once elected. In this respect, the debate centers on the judicial positions taken by the judges individually, in Chamber or Grand Chamber formations and whether their decisions are seen as acting in ways that are normatively justifiable as judges of a European Court of Human Rights. In different Council of Europe states and publics, what counts as a normatively justifiable position for a judge of the ECtHR has been subject to diverse considerations.[128] While some states view the Court and its judges as too interventionist and activist, others have concerns in the opposite direction, with worries about the Court failing to intervene adequately and strongly in reviewing the decisions of national courts, parliaments and executives. The insertion of the 'margin of appreciation' into the preamble of the Convention following the Brighton Declaration can be seen as a request from the member states to the judges of the

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[123] *Id.* at 19.

[124] *Id.* at 32.

[125] Mikael Rask Madsen, *The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights*, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (Michal Bobek ed,, 2015).

[126] *Id*. at 278.

[127] *Id.*

[128] Çalı, et al., *supra* note 15.

Court to act in more deferential ways to domestic parliaments and supreme courts.[129] Increasing the perceived legitimacy of the ECtHR amongst states that prefer a more deferential court, however, stands in conflict with the principle of the ultimate independence of the judges once elected. We also note that there are several JSG practices at the Court that may have an impact (although we do not know to what extent) on the direction that the Court's jurisprudence takes, e.g. the Jurisconsult and the Bureau. The margin of appreciation was inserted into the Convention based partly on concerns that the Court's practices were violating the democratic principle by failing to respect the positions reached by democratically elected domestic parliaments. In the following section we explore the extent to which JSG practices at the Court respect, or not, this key principle as well as how JSG affects the separation of powers at the Council of Europe.

D. Separation of Powers and Democratic Principle

Our position is that the existing levels of JSG at the ECtHR reflects a commitment to the separation of powers and to respect of the democratic principle. Political masters are ultimately responsible for the selection and election of judges given that the Advisory Panel's powers are non-binding and aim at quality assurance of the candidates only. The fact that the judges, once elected, enjoy high levels of JSG in the running of the Court is itself respectful of the separation of powers in terms of limiting the potential for executive or legislative influence on the Court's judicial decision-making. It is crucial for the Court to function without the risk of political influence on its day to day administration and by extension in the judicial activities of its judges.

The high levels of judicial independence of ECtHR judges post-election, however, has raised concerns with regard to its compatibility with the democratic principle.[130] Proponents of this view hold that some judgments of the ECtHR run counter to the democratic decision making by domestic parliaments. The tension between the interpretive authority of the ECtHR and democracy is a perennial one as it is widely accepted that democratic decision making alone does not make any state immune from rights-based Strasbourg review. It has been argued, however, that the democratic selection of judges, by democratically elected parliamentarians, together with the relatively weak review powers of Strasbourg judges (as

[129] Some have argued that this had an important effect on the Court's case law. *See* Oddný Mjöll Arnardóttir, *Rethinking the Two Margins of Appreciation*, 12 EUROPEAN CONST. LAW R. 27–53 (2016) and Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMPORARY PROBLEMS 141 (2016).

[130] *See* Richard Bellamy, *The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights,* 25 EUROPEAN J OF INTL L 1019–1042 (2014).

they do not have the power to strike down legislation) do adequately address the concerns expressed with regard to democratic legitimacy.[131]

The view that there must be vigilance to ensure that JSG at the Court does not undermine the democratic principle has also found its reflection in political capitals and culminated in the insertion of the principle of the margin of appreciation into the preamble of the Convention following the deliberations in Brighton in 2010.[132] It must be noted, however, that the insertion of this doctrine into the preamble does not alter judicial independence as the most protected value of the Strasbourg JSG arrangement. The judges are still free to decide when this principle is employed and when the Convention interpretation must give way to democratic decision making. Yet, a recent study by Madsen shows that post Brighton decisions of the ECtHR place significant emphasis on the margin of appreciation.[133] The political masters of the ECHR, therefore, have been able to influence judicial decision making in favor of domestic institutions without altering the JSG structures in place at Strasbourg.

In terms of judicial selection, the existing procedures, present a careful balance between executive, legislative and judicial input into the selection of judges. The most powerful body remains PACE. National parliamentarians have the ultimate power and authority to appoint judges from a list of three options. The Executive has its role in judicial selection through the initial submission of candidates although the process of national selection varies significantly from country to country in terms of executive influence on the creation of the final list of candidates.[134] While the Advisory Panel has introduced an element of JSG into this process it remains constrained by the actions of both the national governments, in terms of the candidates proposed, and by PACE with respect to who is ultimately elected as a judge. The operation of a two stage scrutiny process of candidates by the Advisory Panel and the PACE Committee means that the Advisory Panel's recommendations are themselves subject to some oversight by the legislature.

While the Panel has lamented the few occasions where candidates have been maintained on the lists submitted to PACE despite their negative assessment it could be argued that

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[131] *Id.* at 1036–1037. Bellamy describes the Court's review powers as "a 'soft' version of strong review" on the grounds that the rulings are binding on High Contracting Parties but the Court does not have the power to strike down national laws.

[132] European Court of Human Rights, *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[133] Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?* (June 27, 2017). Forthcoming in JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT; iCourts Working Paper Series No. 100. Available at SSRN: https://ssrn.com/abstract=2993222.

[134] *See supra* note 74.

PACE, as elected representatives, can and should disagree with the Panel if it sees fit. The former Panel Chairperson, John Murray, seemed to suggest that PACE "has the right and power" to decide that a candidate is *not* qualified even if the Panel reached a positive finding on their eligibility but that they should not "consider qualified somebody whom the Panel did not."[135] This, seems to us, to amount to over-reach on the part of the Panel, which is essentially there to advise PACE on how to fulfil its role as the ultimate authority on judicial selection.

The Court must also remain vigilant that proposals for further reform to the judicial selection procedures do not tilt the balance of separation of powers too strongly in favor of the judiciary at the expense of the other branches. There appears to be no appetite to give the findings of the Advisory Panel any legally binding quality. This coheres with the separation of powers and the democratic principle. In remarks to a meeting of Ministers' Deputies in March 2017 the former Panel Chair made it clear that while the creation of the Panel "has strengthened the overall process of selection" that "structural changes to improve the process must still be considered."[136] He does not offer any concrete proposals but notes that this could be done in several ways like strengthening "the obligation of governments to consult the Panel" or creating a "more structured connection" between the Panel and PACE.[137] One possible idea would be to have a member of the Panel present during the PACE Committee's deliberations to help build "mutual trust"[138] and we note that this proposal has been endorsed by the CDDH in their 2017 review of judicial selection.[139] We further note that the recently adopted Copenhagen Declaration states that "there is still room for improvement in several areas"[140] of the judicial selection process and goes on to endorse the CCDH recommendations.[141] While there may still be room for improvement in how the national governments, the Advisory Panel and PACE communicate we believe that the elected representatives must continue to have the final say on judicial selection.

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[135] *Supra* note 34, at 18.

[136] *Supra* note 30, at 22 and 25.

[137] *Supra* note 30, at 25.

[138] *Id.*

[139] *Supra* note 37, at para. 96–97.

[140] *Supra* note 38, at para. 57.

[141] *Id*. at para. 62.

E. Conclusion

There are several stories to tell with regard to JSG practices at the ECtHR from the "embryonic"[142] forms of JSG in the judicial selection process to the strong levels of JSG that judges enjoy once elected. The JSG practices and reforms further interact with the substantive values of independence, transparency, accountability and legitimacy in different ways. We noted that the aim of the JSG reforms to the judicial selection process were rooted in concerns about independence and legitimacy. However, it is also clear from pre-existing empirical work that legitimacy concerns relating to the quality of judges was not shared universally[143] and despite a perception of concerns about judicial independence, the evidence showed this to be relatively strong prior to any reform process.[144] Nevertheless, the introduction of greater JSG in judicial selection, by way of the Advisory Panel, is to be welcomed as an additional quality control mechanism that appears to be having a positive impact despite the concerns that remain with regard to its recommendations being followed in every case.

Transparency is not a value that is consciously promoted, through the operation of JSG at Strasbourg, and in fact, the JSG practices both in terms of judicial selection and court administration are decidedly non-transparent. We welcome the recent proposals made by Judge Albuquerque,[145] in terms of improving transparency in certain aspects of court administration but remain skeptical of suggestions that the judicial selection process should be made more transparent as this risks undermining attempts to attract highly qualified candidates to the role. The operation of JSG at the ECtHR leads to a relatively weak level of accountability, which fully accords with the "judicial trilemma"[146] that international courts face and appears to be the tradeoff that the Council of Europe has made in prioritizing the other values mentioned above.

Supranational courts, like the ECtHR, will always have to strike a fine balance between creating a robust and independent judiciary free from political and state influence while ensuring that the institution continues to maintain its authority, legitimacy and the respect of its key stakeholders. We believe that the operation of JSG at the ECtHR, in its current form, manages to strike this balance well in terms of respecting the democratic principle and the separation of powers. Caution must be exercised, when considering any future reforms to JSG at the ECtHR, that this very fine balance is maintained.

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[142] Alemmano *supra* note 1, at 249.

[143] Cali et al *supra* note 15.

[144] Voeten *supra* note 69.

[145] *Supra* note 68.

[146] *Supra* note *2.*

Articles

Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success

Christoph Krenn[*]

Abstract

This contribution deals with a topic that has so far received scant attention: the administrative governance of the Court of Justice of the European Union (CJEU). Over the course of the last 65 years, the CJEU has developed its own particular version of judicial self-government. This article analyzes its genesis, its characteristic features and provides a comprehensive assessment. Three arguments are put forward: First, self-government at the CJEU can be associated with a number of positive effects for the Court as an institution. It contributes to keeping the Court out of the public limelight, to fostering its judicial authority vis-à-vis key compliance constituencies and to securing its judicial independence. Second, while strong forms of judicial self-government can lead to a lack of transparency and accountability, these problematic side effects have been largely avoided at the CJEU. This is, in many respects, due to the dialogic accountability relationship that has been established with the European Parliament in the context of the EU budgetary process. Nevertheless, third, as regards more recent developments, such as the establishment of an expert panel for selecting new CJEU members and the Court's legislative role in amending its own Statute, from the perspective of transparency, room for improvement exists.

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A. Introduction: the CJEU's debt to international law

When the Court of the European Coal and Steel Community, the predecessor of the Court of Justice of the European Union (CJEU),[1] was established in 1952, it was considered innovative in many respects. Commentators of the time described it as a departure from the standard model of international adjudication.[2] And yet, the Coal and Steel Court borrowed from classic international law one of the most enduring features of its institutional design: the basic idea of its internal governance structure. The Court has taken inspiration from the International Court of Justice (ICJ) and has, over the course of the last 65 years, developed its own particular version of judicial self-government (JSG). This article describes the development and characteristic features of JSG at the CJEU, explains how it relates to the Court's judicial authority, its independence, and the public confidence invested in the Court, and assesses it from the perspective of transparency and accountability.[3] Such analysis has so far not been undertaken. Since the literature on the CJEU's administrative governance is generally scarce,[4] and in order to paint a more vivid picture, this contribution will be partially based on unpublished CJEU administrative documents.[5]

The article puts forward three arguments. First, the CJEU's particular version of JSG can be associated with positive effects for the Court as an institution. It contributes to keeping the Court out of the public limelight, to fostering its judicial authority vis-à-vis key compliance constituencies and to securing its independence. Put poignantly, it can be described as a bedrock for the Court's institutional success. Second, while strong JSG has, in many judicial

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[1] The CJEU consists of two courts, the European Court of Justice (ECJ) and the General Court (GC).

[2] Such as PAUL REUTER, LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER 140 (1953) (underlining innovative features from an international law perspective such as direct standing for undertakings); *see* also Hermann Mosler, *Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl. Entstehung und Qualifizierung* 14 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 42-43 (1951) (comparing the functions of the Coal and Steel Court to those of an administrative and constitutional tribunal).

[3] On the broader objectives of the special issue of which this contribution forms part, *see*, David Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, 19 GERMAN L.J. (2018).

[4] For overviews written by Court insiders *see*, Roger Grass, *Les ressources humaines à la Cour de justice des Communautés européennes, in* LE DROIT A LA MESURE DE L'HOMME. MELANGES EN L'HONNEUR DE PHILIPPE LEGER 69 (Yves Bot et al. eds., 2006); Roger Grass and Alfredo Calot Escobar, *2004-2014: Une période déterminante pour les ressources de l'institution, in* LA COUR DE JUSTICE DE L'UNION EUROPEENNE SOUS LA PRESIDENCE DE VASSILIOS SKOURIS (2003-2015). LIBER AMICORUM VASSILIOS SKOURIS 227 (Antonio Tizzano et al eds., 2015); for contributions that – exceptionally – take a more normative take on the issue, Marc van der Woude, *Towards a European Council of the Judiciary: Some Reflections on the Administration of the EU Courts, in* DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION. ESSAYS IN HONOUR OF JAPP W. DE ZWAAN 63 (Flora A.N.J. Goudappel & Ernst M. H. Hirsch Ballin eds., 2016); and Franklin Dehousse, *The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court*, in 83 EGMONT PAPER (2016).

[5] Documents have been received through access to documents requests 0017/2015D and 0008/2018D.

systems, important downsides from the perspective of transparency and accountability,[6] these problems are attenuated at the CJEU. This is due to high standards of transparency that the EU Treaties set up for the Court when performing tasks of court administration but also, and even more importantly, due to the Court's constructive and dialogic relationship with the European Parliament. The CJEU's activities in the field of court administration are overseen by the Parliament in the course of the annual budgetary discharge procedure, where the Court is held to account for how it organizes the institution and where it receives input on how to improve. Nevertheless, third, as regards more recent developments, such as the establishment of an expert panel for selecting new CJEU members and the Court's legislative role in amending its own Statute, from the perspective of transparency, room for improvement exists.

The *first part* of this contribution traces the development of JSG at the CJEU and explains its central features. The *second part* investigates how the design of JSG at the CJEU can be seen to affect public confidence in the Court, its judicial authority and independence. The *third and final part* explains the mechanisms in place to ensure that – in governing the Court – the CJEU respects EU law standards of transparency and that it can be held accountable in case of mismanagement. Moreover, it points to a number of problematic features from the perspective of transparency.

B. Collegial self-government: the genesis of the CJEU's governance model

In discussing JSG at the CJEU, we will start at the very beginning, namely with the CJEU's predecessor, the Coal and Steel Court, established on 4 December 1952. Although today's CJEU bears little resemblance to the early European judiciary in terms of political power and institutional size, as regards JSG, important ideas stem from these early years (I.). In a second step, we will see how the Coal and Steel Court's model of JSG has been adapted and further developed over time (II.). First, by adjusting the concept of collegial self-government for an institution that has dramatically grown from 9 judicial members and a staff of 65 people (1956) to an institution of 84 judicial members and a staff of 2174 (2018). Second, by tightening the regime for regulating CJEU members' conduct while in office. And third, by gently pushing JSG into a field that is traditionally out of bounds in the classic international law conception of judicial governance, namely the selection of new judges and Advocates General.

[6] *See*, Kosař, *supra* note 3.

I. The beginnings: JSG at the Coal and Steel Court

The Coal and Steel Court was set up in 1952 as the judicial organ of the Coal and Steel Community, a community of six states.[7] The Court's main task was to check on the powers of the High Authority, the predecessor of the European Commission. Since these were largely issues an administrative court would perform at the domestic level, the French *Conseil d'État* served as an important inspiration for the Coal and Steel Court's design.[8] However, when it came to the Court's organizational structure, the drafters of the Statute looked elsewhere. As a French commentator of the time noted: 'The organization of the Coal and Steel Court is reminiscent, in its entirety, of the ICJ.'[9] This started with details, such as the gowns of the judges that were fashioned in the style of the ICJ.[10] On a more fundamental level, the Coal and Steel Court borrowed important rules and ideas on judicial governance from the World Court.[11]

The first principle borrowed was that of self-governance.[12] The organization of the Coal and Steel Court was assigned to the first generation of judges and Advocates General. The Court members themselves built the Court's administration. They each hired a legal assistant of their nationality and were assigned a secretary.[13] Moreover, the Luxembourg judge Charles Léon Hammes, being acquainted with the customs of the Court's hosting state, oversaw the recruitment of the Court's first administrative staff.[14] In 1956, when all

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[7] Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

[8] The main procedural venue in the original setup of the Coal and Steel Court, the annulment procedure, reflects a strong imprint of French administrative law; *see* Thijmen Koopmans, *The Birth of European Law at the Cross-Roads of Legal Traditions*, 39 AMERICAN JOURNAL OF COMPARATIVE LAW 493, 500 (1953).

[9] Jean L'Huillier, *Une conquête du droit administratif français: Le contentieux de la Communauté européenne du charbon et de l'acier*, 13 RECUEIL DALLOZ: CHRONIQUE 63, 66 (1953) (my translation).

[10] Recounting this anecdote, Albert van Houtte, *Souvenirs de la Cour de justice. 1953-1982, in* XXXV ANNI. 1952-1987 69, 79 (Alexander Mackenzie Stuart ed., 1987).

[11] *See*, Anik Antoine, *La Cour de Justice de la C.E.C.A. et la Cour internationale de Justice*, 57 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 210, 261 (1953); further, on inspiration drawn from the ICJ, *see* LOUIS DELVAUX, LA COUR DE JUSTICE DE LA COMMUNAUTE EUROPEENNE DU CHARBON ET DE L'ACIER. EXPOSE SOMMAIRE ET DES PRINCIPES 16 (1956).

[12] On self-government in international courts as a rule of customary international law, *see*, Karin Oellers-Frahm, *Der institutionelle Rahmen: Status, Ausstattung und Personalhoheit internationaler Gerichte*. *Der IGH, der Internationale Strafgerichtshof und das Jugoslawien-Tribunal im Vergleich*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 107, 117 (2003).

[13] *See*, Otto Riese, *Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft für Kohle und Stahl*, DEUTSCHE RICHTERZEITUNG 270, 271 (1958); for an interesting account of how Otto Riese, the first German judge at the Coal and Steel Court, selected his law clerk, *see*, Hans Wolfram Daig, *Erinnerungen an die Frühzeit des Gerichtshofes, in* XXXV ANNI. 1952-1987 127, 128 (Alexander Mackenzie Stuart ed., 1987).

[14] René Hochstrass, *Les premiers jours de la Cour*, *in* XXXV ANNI. 1952-1987 119, 119 (Alexander Mackenzie Stuart ed., 1987).

positions had been filled, the administrative personnel counted 65 people: three librarians, eight translators, nine drivers, five court ushers, two accountants, and a number of typists.[15]

The communal spirit of the early days translated into the Court's every-day practice. The Coal and Steel Court rested on a basic organizational structure that is, in principle, still in place at the CJEU today. All major decisions concerning its administration were assigned to a central self-government body, the *réunion générale*, which comprised the Coal and Steel Court's seven judges.[16] They were joined by the two Advocates General in an advisory capacity and the Court's Registrar assisted the meetings.[17] The *réunion générale* had a vast set of competences. In the field of appointing and managing personnel, it selected the Court's Registrar,[18] all of the Court's administrative staff[19] and the law clerks;[20] and defined their duties and status.[21] The *réunion générale* was also competent for disciplinary matters, could lift the immunity of a judge,[22] force judges to recuse themselves in specific cases,[23] but also deprive a judge of office by unanimous vote if he or she no longer fulfilled the requisite conditions for office.[24] As regards these latter rules, the respective provisions were literally copied from the ICJ Statute.[25]

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[15] A complete list can be found in the report of the Coal and Steel Community's auditor, RAPPORT DU COMMISSAIRE AUX COMPTES URBAIN J. VAES RELATIVE AU QUATRIEME EXERCICE FINANCIER 20 (deuxième volume, 1 juillet 1955 au 30 juin 1956).

[16] To be sure, the role of international courts' plenaries in administrative and disciplinary matters differs between courts, *see* Stéphanie Cartier and Cristina Hoss, *The Role of Registries and Legal Secretariats in International Judicial Institutions*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 711, 717 (Cesare Romano, Karen Alter & Yuval Shany eds., 2014).

[17] Only if administrative questions directly concerned the office of Advocate General, the Court decided upon their proposal; *see* Article 25 para 7 Coal and Steel Court Rules of Procedure (RoP).

[18] Article 14 Coal and Steel Court Statute.

[19] Article 12 para 1 Coal and Steel Court RoP.

[20] Article 20 Coal and Steel Court RoP.

[21] Article 14 and 16 Coal and Steel Court Statute.

[22] Article 3 Coal and Steel Court Statute.

[23] Article 19 Coal and Steel Court Statute (in case the need was seen for a judge to recuse himself, he could be informed by the President of the Court. In case of conflict, the plenary would decide).

[24] On the grounds for disciplinary proceedings *see*, JEAN DE RICHEMONT, LA COUR DE JUSTICE. CODE ANNOTÉ. GUIDE PRATIQUE 15-16 (1954); for Advocates General a different rule applied, they could be deprived of office through unanimous Council decision; *see* Article 13 para 2 Coal and Steel Court Statute; further, KPE LASOK, THE EUROPEAN COURT OF JUSTICE. PRACTICE AND PROCEDURE 19 (2nd ed., 1994).

[25] Antoine, *supra* note 11, at 261.

The only field of judicial government that was strictly out of bounds for the Coal and Steel Court was the recruitment of new judicial members. While the judges and Advocates General were free to organize the institution at their will, when it came to selecting new judicial members, the Member States kept a tight grip on the Court. Also, this was in line with international law practice at the time.[26] According to Article 32 of the European Coal and Steel Treaty, judges were selected by 'common accord' of the Member States for a renewable term of six years. In practice, individual governments nominated their candidates who were then rubber-stamped by the other Member States.[27]

II. Continuity and change: the central features of JSG today

The European integration project has significantly evolved since the 1950s and so has the European Court. In 1958, the Coal and Steel Court was merged with the newly established Court of Justice of the European Communities, which is today the CJEU. While the Coal and Steel Court decided only 26 cases during the first ten years of its existence, today, the CJEU's docket comprises roughly 1600 cases per year.[28] To cope with this increased workload, the Court itself has grown, encompassing since 1989 the European Court of Justice (ECJ) and the General Court (GC). Together they currently employ 84 judicial members[29] and a staff of 2174 people.[30] The CJEU's administration encompasses a language department of 994 interpreters and translators, the latter translating no less than 1 112 924 pages in 2017;[31] a research, documentation and library department of 101 people, who scan incoming applications and provide comparative law research; a total of 537 law clerks and assistants working in the judicial members' cabinets, and roughly 300 people working in administrative, logistical and IT services.[32]

The first remarkable development in judicial governance at the CJEU is the fact that, despite these massive changes, the original model of self-government has, with some adaptation, remained intact. The most important administrative decisions still remain in

[26] On the conception of international judges as 'ambassadors for the state', RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 60 (2010).

[27] NICOLE CONDORELLI-BRAUN, COMMISSAIRES ET JUGES DANS LES COMMUNAUTES EUROPEENNES 108-109 (1972).

[28] The ECJ completed 699 cases in 2017 the General Court 895 cases (JUDICIAL ACTIVITY REPORT 101 and 207) (2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_2017_en.pdf.

[29] The ECJ currently has 28 judges and 11 Advocates General, the GC 45 judges (1 December 2018).

[30] As of 31 December 2017, https://curia.europa.eu/jcms/jcms/P_80908/en.

[31] COURT OF JUSTICE OF THE EUROPEAN UNION, MANAGEMENT REPORT 14 (2017); https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/rapport_gestion_2017_en-web.pdf.

[32] *Id.*, 55.

the judicial members' hands (1.). In two respects, however, the CJEU's governance model has been further developed. While regulating judges' and Advocates' General conduct in office has always been the Court's sole competence, today a dense net of rules defines the duties and obligations of CJEU members (2.) As regards the appointments of new judges and Advocates General the Court remains on the sideline. However, the power of Member States to appoint new CJEU members at their will has been attenuated through the establishment of an expert panel that assesses candidates' qualifications and which has gained an influential role in the selection process (3.).

1. Collegial self-government in an enlarged Court

The CJEU's institutional growth has brought two challenges to its internal governance structure. First, an administration that, due to its size and multiple tasks, requires significantly more administrative guidance and management than during the Court's early years.[33] And second, the challenge of upholding the collegial character of administrative decision-making in an institution that encompasses two courts, the ECJ and the GC. The Court has reacted to these challenges by creating a multiplicity of internal self-government bodies that stand in close connection with each other.

The ECJ and the GC today both have their own self-government structure. The GC has its own President, responsible to represent the GC and direct its judicial business, its own Vice-President, and a Registrar.[34] It has a separate administrative meeting[35] and its own committees. Yet, when it comes to questions that concern the CJEU as a whole, the ECJ's *réunion générale*, in which only ECJ judges and Advocates General take part and have a vote (and not the GC judges), is the central decision-making body.[36] The issues decided here include questions of budget, the appointment of administrative directors, proposals on modifications to the CJEU's Statute or the Court's input in intergovernmental conferences.[37]

Due to the complexity and number of decisions to be taken for the CJEU as a whole, they are prepared by a number of committees. The most important is the ECJ administrative committee. The administrative committee is a key venue to also include the GC into the CJEU's overall governance structure. The ECJ administrative committee is headed by the

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[33] *See* already, Grass, *supra* note 4.

[34] Article 9 GC RoP.

[35] Article 42 para 1 GC RoP.

[36] Article 25 ECJ RoP.

[37] Jean-Claude Bonichot, *Le métier de juge à la Cour de justice des Communautés européennes*, 16 REVUE DES AFFAIRES EUROPEENNES 531, 535 (2007/08).

ECJ's President and composed of him, six further ECJ members, the President of the GC and a further GC member.[38] The committee members are appointed for the three years of an ECJ President's term in office. All major employment and work-related issues pass through the administrative committee, as do budgetary questions.[39] Moreover, it is involved in the recruitment of high-level officials, and also conducts interviews on those occasions[40] or decides on the restructuring of the Court's service departments.[41] Every ECJ and GC member is informed about the committee's agenda and is equipped with all relevant documents and the minutes of the committee's sessions.[42] Every question the administrative committee tackles, can be reassigned to the ECJ's *réunion générale*, either by the committee itself or at the request of a member of the Court.[43]

While this complex institutional arrangement ensures broad information and a chance to participate for all CJEU judicial members, one should certainly not overstretch the notion of collegial self-government in a court of the CJEU's size. Important asymmetries and exceptions to collegiality exist. A first important point concerns the GC's overall position in CJEU governance. While the GC is represented in the ECJ's administrative committee and the ECJ regularly consults with the GC,[44] in principle, the ECJ controls the CJEU's resources.[45] For a long time, the GC has complained about its dependence on the ECJ's goodwill when it comes to its institutional resources.[46] On an individual level, not all CJEU

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[38] Art. 3 of the *Décision de la Cour de justice du 20 octobre 2015 relative au comité administratif de la Cour* (on file with the author).

[39] For instance, *Procès-verbal de la réunion spéciale du comité administratif du 24 mars 2014* (on file with the author).

[40] For instance the hiring process of the Court's 'Conseiller juridique pour les affaires administratives', *see Procès-verbal de la réunion du comité administratif du 6 juillet 2015*, at 1 (on file with the author).

[41] On the re-structuring of the Court's communications department, *Procès-verbal de la réunion du comité administratif du 5 novembre 2014* (on file with the author).

[42] Art. 6, *supra* note 38.

[43] *Id.*, Art. 7.

[44] Van der Woude, *supra* note 4, at 71.

[45] According to Article 12 CJEU Statute, officials and other servants are attached to the Court of Justice and responsible to the ECJ's Registrar under the authority of the ECJ President. While, according to Article 52 CJEU Statute, certain officials are directly responsible to the Registrar of the GC under the authority of the President of the GC, they nevertheless remain attached to the ECJ, which is, according to Article 9 ECJ RoP responsible for all CJEU resources. As van der Woude, *supra* note 4, at 70, highlights, Article 9 para 3 ECJ RoP ('The President shall ensure the proper functioning of the services of the Court.'), suggests, notably in its non-English version, that all resources are attached to the ECJ and the GC does not have own resources.

[46] *See* then-GC President Bo Vesterdorf's submission to the discussion circle on the Court of Justice in the Convention on the Future of Europe, Oral presentation by Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the 'discussion circle' on the Court of Justice on 24 February 2003; available at: https://www.cvce.eu/.

members have an equally influential place in the Court's administrative governance. Notably, the ECJ President takes a special place. He or she is appointed by the fellow ECJ judicial members for a renewable term of three years and presides at the *réunion générale*, represents the Court to the outside, and has the task to 'ensure the proper functioning of the services of the Court.'[47] The President's special place does not only result from the prestige of the position and the administrative tasks attached to this office, but also from the fact that the ECJ President has full discretion to assign cases to ECJ judges.[48] This presents the potential to reward judges with high-profile cases, or conversely, assign rather technical or low-profile cases.[49] According to reports, the President's outstanding position has been used in the past to steer the Court's administrative agenda.[50]

2. Being a European judge: codes and statistics

A central element of judicial governance concerns the regulation of judicial members' conduct while in office. What duties does a European judge or Advocate General have? And who may remind her of these duties? Following the ICJ's example, the principled competence of the Court to decide itself on the obligations of judicial members and on disciplinary matters had already existed in the Coal and Steel Court. However, the early years of the European judiciary were rather lenient times. Rules on judicial conduct, such as the duty to reside at the Court's seat,[51] or the duty not to engage in political or administrative activities,[52] were not taken too seriously. Coal and Steel Court members regularly commuted to their home countries or continued working, often as advisors, for their governments.[53] This leniency is a thing of the past. The duties of CJEU members are today regulated in detail and their observance is checked.

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[47] Article 9 para 3 ECJ RoP.

[48] Jean Quatremer, *La justice européenne au bord de la crise de nerfs*, LIBÉRATION: COULISSES DE BRUXELLES (Apr. 26, 2015), http://bruxelles.blogs.liberation.fr/2015/04/26/la-justice-europeenne-au-bord-de-la-crise-de-nerfs (relying on an anonymous source from within the Court who describes a concentration of powers with then-President Skouris).

[49] *See* Article 15 para 1 ECJ RoP.

[50] For an example *see* the alleged attempts by former President Skouris to create an attractive job in the Court's administration for his former chef de cabinet against the opposition of inter alia the Court's Registrar, *see* Jean Quatremer, *Copinage et clientélisme à la Cour de justice européenne*, LIBÉRATION: COULISSES DE BRUXELLES (June 8, 2015), http://bruxelles.blogs.liberation.fr/2015/06/08/copinage-et-clientelisme-la-cour-de-justice-europeenne.

[51] Article 9 Coal and Steel Court Statute.

[52] Article 32 Coal and Steel Treaty and Article 4 para 3 Coal and Steel Court Statute; only if the Council agreed by a two-thirds majority, could the judges be authorized to engage in an unpaid or gainful occupation.

[53] A most vivid example is, what has been called, the *Affaire Rueff*. Already during the year 1958, Jacques Rueff, the French Coal and Steel Court judge, had led a French government committee in charge of restructuring public finances. In November 1959 he officially resigned as a judge, to return to Paris to become vice-president of a committee in charge of reforming the French economy. Both the obligation to continue his work as a judge until a

The two most important set of rules are the CJEU's Code of Conduct and the Court's case management system. The Court's Code of Conduct was first introduced in 2007[54] and revised in 2016.[55] It includes rules on independence and integrity (Article 3), impartiality (Article 4), a duty to declare personal interests (Article 5), an obligation of loyalty towards the institution (Article 6), and rules on discretion (Article 7). Furthermore, Article 8 of the Code of Conduct makes all external activities, from participating in conferences or seminars to teaching, to assuming duties in foundations, subject to prior authorization by the Court. The focus is, as Article 2 of the Code holds, on ensuring that CJEU members devote themselves fully to the performance of their duties. Article 10 of the Code sets up a 'committee of eldest', responsible for ensuring its proper application. The committee is composed of the ECJ President and the three ECJ members who have been longest in office. If a member of the GC is concerned, the GC President, the GC Vice-President and another member of the GC take part in the deliberations of the committee. Little is known about the actual working of the disciplinary committee. It seems to work as a backup accountability mechanism that is rarely used. It has notably been invoked in a heated conflict between then-ECJ President Skouris and GC President Jaeger over the idea to double the number of GC judges.[56] In 2014 another possible violation of the Code has been examined.[57]

In the day-to-day business, the strongest effect on CJEU members' conduct arguably stems from the Court's case management system.[58] As the Court describes it itself, it employs 'a

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successor had been named (Article 5 ECSC Statute) and the duty not to engage in administrative or political activities (Article 4 ECSC Statute) had been ignored. This created a highly uncomfortable situation for the Court. During one year, it had to exclude the youngest of its members from its deliberations, deciding with five judges only, in order to conform with the obligation to sit in unequal numbers. It was not until September 1960 that France reappointed a judge to the Court: surprisingly, and quite embarrassingly for the Court, an unmotivated Jacques Rueff, who stayed on the Court for another two years until he was again urgently needed in Paris; *see*, Antonin Cohen, *Juge et expert. L'Affaire Rueff ou la codification des règles de la circulation internationale*, 59 CRITIQUE INTERNATIONALE 69 (2013).

[54] Code of Conduct [2007] OJ C223/1.

[55] Code of Conduct for Members and former Members of the Court of Justice of the European Union [2016] OJ C483/1.

[56] A letter from then-ECJ President Vassilios Skouris to GC President Marc Jaeger was leaked. In this letter Skouris alleged that Jaeger had damaged the CJEU's position by communicating directly with the President of the COREPER on the GC's institutional reform – a prerogative of the ECJ President. Skouris mentions in this letter that the committee under Article 7 of the (2007) Code of Conduct has, in light of these events, decided not to grant additional staff to the GC; *see* Duncan Robinson, *The 1st rule of ECJ fight club…is about to be broken*, FINANCIAL TIMES: BRUSSELS BLOG (April 27, 2015), http://blogs.ft.com/brusselsblog/2015/04/27/the-1st-rule-of-ecj-flight-club-is-about-to-be-broken.

[57] *2014 discharge. Questionnaire to European Court of Justice*, at 6 (on file with the author).

[58] *See*, Vassilios Skouris, *Höchste Gerichte an ihren Grenzen – Bemerkungen aus der Perspektive des Gerichtshofes der Europäischen Gemeinschaften, in* DIE ORDNUNG DER FREIHEIT. FESTSCHRIFT FÜR CHRISTIAN STARCK ZUM SIEBZIGSTEN GEBURTSTAG 991, 997 (Rainer Grote et al eds., 2007).

constant case-flow control of each step of the procedure on the basis of complex and numerous indicators.'[59] An early warning system is in place, and 'the President/President of Chamber [intervenes] in time in order to discuss the matter with the Judge Rapporteur, eventually the Advocate General concerned.'[60] In the GC, case management seems to be even more stringent than in the ECJ. Lists are kept that contain time limits for different steps in the preparation of judgments, set out delayed cases and measures to eliminate the delays, and show the number of cases closed by each judge per quarter and per year.[61] Indeed, anecdotal evidence shows that the CJEU's case management system creates real pressure. In a rather unusual step, after a couple of months in office, British ECJ judge Christopher Vajda criticized, in an internal memo, the unrealistic rhythm imposed on the judges.[62] Excessive pressure at the CJEU has also been brought up by other Court members.[63]

3. Selecting CJEU members: the new role of experts

A final important development in the governance of the Court concerns the selection of new CJEU members. Until 2009 the normative framework for selecting judges and Advocates General had hardly been altered. Every Member State appointed her candidate for the bench while in relation to nominations by the other Member States the principle 'live and let live' prevailed.[64] A judge or Advocate General proposed by a Member State would quasi-automatically be appointed to the CJEU. In recent years, however, the situation has changed. Through the 2009 Lisbon Treaty, Article 255 TFEU has been inserted into the Treaties. It sets up an advisory panel (the 255 Panel) for the selection of CJEU members.[65] The 255 Panel is composed of seven experts, mainly senior national and

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[59] *2013 discharge questionnaire to the European Court of Justice*, at 5 (on file with the author).

[60] *Id*.

[61] Dehousse, *supra* note 4, at 51-52.

[62] *See*, Dominique Seytre, *Pour une liste de juges retardaires?*, LE JEUDI, (June 6, 2013), http://jeudi.lu/pour-une-liste-de-juges-retardataires.

[63] Most forcefully by Eleanor Sharpston, *Making the Court of Justice of the European Union More Productive*, 21 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 763 (2014).

[64] Henri de Waele, *Not Quite the Bed that Procrustes Built. Dissecting the System for Selecting Judges at the Court of Justice of the European Union, in* SELECTING EUROPE'S JUDGES. A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 24, 49 (Michal Bobek ed., 2015).

[65] Article 255 TFEU, in its present form, goes back to the European Convention preparing the draft Treaty establishing a Constitution for Europe in the early 2000s, and to the fear of the rise of 'political nominations' in particular in light of the upcoming enlargements of the Union. *See* René Barents, *The Court of Justice in the Draft Constitution, in* 11 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 121, 139 (2004); *see* also Thorbjörn Björnsson and Yuval Shany, *The Court of Justice of the European Union*, in ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 292 (Yuval Shany ed., 2014).

former European judges, currently headed by former ECJ judge, Christiaan Timmermans.[66] Its task is to prepare the final selection decision of the 'representatives of the governments of the Member States'[67] by rendering opinions on candidates' qualifications. The Panel bases its decisions on a number of documents, notably the candidate's CV, the reasons of the candidate to apply for the position and the reasons of the government proposing her, information on the national pre-selection procedure, and works published by the candidate. Unless the candidate is proposed for re-appointment, an interview of one hour is conducted.[68]

To be sure, the establishment of the 255 Panel does not establish judicial self-government in the sense that the CJEU has a say in the selection of new members. However, at least indirectly, it has led to increasing the Court's influence on selection processes.[69] The ECJ President presents a proposal for the Panel's composition,[70] which the governments of the Member States so far have followed.[71] This leads, as commentators have observed, to a factual right of co-determination in the composition of the Panel.[72]

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[66] For the current composition of the Panel, *see* Council Decision (EU, Euratom) 2017/2262 of 4 December 2017 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union.

[67] *See* Articles 253 and 254 TFEU.

[68] In detail, de Waele, *supra* note 64, at 35-39.

[69] Alberto Alemanno, *How Transparent is Transparent Enough? Balancing Access to Information Against Privacy*, in SELECTING EUROPE'S JUDGES. A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS, *supra* note 64, 202, at 204 ('some embryonic form of unintended judicial self-government'); in this sense, *see* also Tomas Dumbrovský, Bilyana Petkova & Marvin Van der Sluis, *Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States*, 51 COMMON MARKET LAW REVIEW 455, 481-482 (2014) (speaking of the potential for a 'subtle move' in the direction of judicial self-government).

[70] Article 255 para 2 TFEU.

[71] As regards the first panel proposed by then-President Skouris, *see* Council of the European Union, Recommendation concerning the composition of the panel provided for in Article 255 TFEU, Doc 16858/13 JUR 600 INST 638 COUR 92 + ADD (December 4, 2013), and the approval without discussion as an A-item by the Council of the EU, Council of the European Union, Council Decision appointing the members of the panel provided for in Article 255 TFEU = Adoption, Doc. 16858/13 JUR 600 INST 638 COUR 92 + ADD 1 (January 22, 2014).

[72] Ulrich Karpenstein, *Artikel 255 AEUV, in* DAS RECHT DER EUROPÄISCHEN UNION, margin number 11-12 (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2017). Moreover, according to Article 255 TFEU, the ECJ President has also proposed the operating rules of the Panel adopted in 2010. With only cosmetic linguistic changes by the Council they had been approved. For the ECJ President's proposal *see*, Council of the European Union, Recommendation relating to the operating rules of the panel provided for in Article 255 TFEU, Doc. 5195/10 JUR 5 INST 2 COUR 1 (January 11, 2010); for the Council's final decision, Council Decision 2010/124/EU relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, O.J. L50/18, Annex (2010).

The Panel's opinions are legally non-binding. However, in practice, the Panel has gained important influence. Its principled lever lies in the structure of appointments. The Member States appoint judges and Advocates General by unanimity and the 255 Panel's opinions are communicated to all Member States. Hence, all Member States would have to agree to ignore the Panel's views as regards a candidate, a situation that is very unlikely to occur.[73] From March 2010 to February 2018 the Panel has delivered a total of 147 opinions, 74 of which were on candidates who were proposed for a renewal of office and 73 on candidates for a first term of office. While candidates for a renewal of office were all deemed suitable, of the 73 opinions on candidates for a first term of office, 14 opinions (19,2 percent) were unfavorable.[74] All of the Panel's 14 negative opinions have been followed by the Member States and accordingly new candidates have been proposed.[75]

Figure 1: The selection of CJEU judges post-Lisbon

C. The CJEU's governance model and the Court's institutional success

In the preceding section, we have examined the genesis of the CJEU's governance model and its defining features. In this section, we will engage in an analysis of the effects of this specific version of JSG for the Court as an institution. The CJEU is considered one of the most powerful courts worldwide.[76] Surveys show that the confidence of the general public in the Court is high.[77] Moreover, the Court's independence is comparatively strong.[78] In

[73] Michal Bobek, *Epilogue. Searching for the European Hercules, in* SELECTING EUROPE'S JUDGES. A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 282 (Michal Bobek ed., 2015).

[74] Fifth Activity report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union, 28 February 2018, at 15.

[75] *Id.*, at 14.

[76] From the vast literature on the topic *see* only ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE (2006); KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER (2009).

[77] The European Court of Justice is the most trusted of all institutions of government assessed in Eurobarometer surveys; *see* R. Daniel Kelemen, *The political foundations of judicial independence in the European Union*, 19 JOURNAL OF EUROPEAN PUBLIC POLICY 43 (2012).

[78] *See* LOUIS HANCISSE, AMANDA MCMENAMIN, MARK PERERA & RONNY PATZ, THE EUROPEAN UNION INTEGRITY SYSTEM 125 (2014).

line with the broader objectives of this special issue,[79] I will link the main findings in EU scholarship on the conditions for public confidence in the Court (I.), its judicial authority (II.) and independence (III.) to the specific features of its governance model.

I. Avoiding controversy: JSG and public confidence

Much of the discussion on the structure of and reasons for public confidence in the CJEU is coined by a set of articles published in the 1990s by Greg Caldeira and James Gibson.[80] Based on surveys, they assessed public confidence in the European judiciary. In a nutshell, they argued that the general public knows too little about the Court to make informed judgments and that it therefore relies on proxies to assess its confidence in the CJEU. As Caldeira and Gibson summarize their findings: 'In the absence of information about the Court of Justice, ordinary citizens depend on this institution's connection with the EU, as well as its association with broad political and legal values such as the rule of law and individual liberty.'[81] Eric Voeten has recently updated this analysis. He comes to the conclusion that although the CJEU is today more frequently in the public limelight, trust in the Court is still largely correlated to people's general trust in the EU and in domestic judicial systems. This leads Voeten to argue that the Court, 'should not worry on a daily basis about the general public other than avoiding decisions that lead to public outcries, although these may not be perfectly predictable.'[82] The development of levels of trust in the Court (figure 2) support these findings. The two major declines in trust in the Court in the early 1990s and between 2010 and 2012 can be linked to two major crises of the European integration project that affected trust in the EU as such: the EU-skeptical environment surrounding the ratification of the Maastricht Treaty and the financial and sovereign debt crisis.

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[79] *See*, Kosař, *supra* note 3.

[80] Gregory A. Caldeira & James L. Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, 89 AMERICAN POLITICAL SCIENCE REVIEW 356 (1995); James L. Gibson and Gregory A. Caldeira, *Changes in the Legitimacy of the European Court of Justice*, 28 BRITISH JOURNAL OF POLITICAL SCIENCE 63 (1998).

[81] Caldeira & Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, *supra* note 80, at 365.

[82] Eric Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES IN LAW 411, 416 (2013).

Figure 2: Public trust in the CJEU (Eurobarometer results)

Given how the public forms its opinion on the CJEU, the only important requirement, as regards the Court's administrative governance, seems to be that it runs smoothly. In principle, the CJEU's governance structure is well suited to do the job, keeping and managing conflicts inside the Court. The involvement of all CJEU members in the administration of the Court, in particular through its administrative committee work, creates a decision-making structure that provides procedural means to manage disagreements internally. Indeed, the only example of a major conflict on judicial government in the CJEU, which received extensive media coverage,[83] concerned an intra-institutional dispute between the ECJ and the GC on raising the number of judges at the GC. Against the will of the GC, which preferred different measures to enhance its productivity, the ECJ had used its prerogative in legislative reform of the CJEU Statute to push for doubling the number of GC judges. The process led to intensive controversies over

[83] *See*, for instance, Robinson, *supra* note 56. On a further conflict on the drafting of the CJEU's Code of Conduct, where the GC felt marginalized, *see* Dominique Seytre, *Les juges et le syndrome "Mirza"*, LE JEUDI (December 8, 2016).

who speaks for the Court vis-à-vis the Member States and the European Parliament, the threat of disciplinary measures against the GC President[84] and lobbying by the ECJ President with major EU governments.[85] Yet, this was a singular event and rather special conflict.[86]

Besides such rare disputes, the selection of new judicial members presents moments where the public takes notice of the Court. In the past, the nomination of ill-qualified candidates or politically motivated nominations has been critically discussed in the press.[87] The establishment of the 255 Panel arguably contributes to changing public perceptions in this regard. When in 2014 a Greek candidate for a vacancy at the GC had received a negative opinion by the 255 Panel, in the Greek press, the Panel was presented as an effective check against personal and political favoritism that was allegedly behind the rejected proposal.[88] Newspaper reports on rejections of Maltese,[89] Swedish[90] and Austrian[91] candidates by the Article 255 Panel similarly present the Panel in a positive light and as a guarantee for candidates' judicial expertise. In that sense, one could suggest that the establishment of the 255 Panel has indeed strengthened public confidence in selection processes of new judges, which could in turn foster public confidence in the Court. To be sure, more systematic research is required to back up this argument.

II. Professionalism: JSG and judicial authority

While public confidence is a side strand in the study of the CJEU, a vast field of research deals with the CJEU's judicial authority i.e. the acceptance and use of the Court's case law

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[84] *See* Robinson, *supra* note 56.

[85] Dehousse, *supra* note 4.

[86] For the whole story, *see* Alberto Alemanno & Laurent Pech, *Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System*, 54 COMMON MARKET LAW REVIEW 129 (2017).

[87] *See* Barents, *supra* note 65, at 139.

[88] Κοσμοπολιτικός πατριωτισμός [Cosmopolitan Patriotism], Το Βήμα (June 6, 2010), http://www.tovima.gr/opinions/article/?aid=335911.

[89] *Chief Justice fails in bid for European Court job*, TIMES OF MALTA (March 3, 2016) https://www.timesofmalta.com/articles/view/20160303/local/chief-justice-fails-in-bid-for-european-court-job.604431.

[90] *Stefan Strömberg anses ej lämplig som EU-domare* [Stefan Strömberg is not considered suitable as EU judge], REALTID.SE (August 3, 2012); http://www.realtid.se/stefan-stromberg-anses-ej-lamplig-som-eu-domare.

[91] *Regierung schlägt Grazer Professor Kumin als EuGH-Richter vor* [Government proposes Professor Kumin from Graz as ECJ judge], DIE PRESSE (Nov. 12, 2018); https://diepresse.com/home/ausland/eu/5528760/Regierung-schlaegt-Grazer-Professor-Kumin-als-EuGHRichter-vor.

by domestic courts and governments.[92] Compared to other courts beyond the state, the CJEU's authority is particularly strong. In contrast to the question of public confidence, where general public perceptions count, for judicial authority, the Court's appearance to key compliance constituencies matters most. Notably domestic courts and Member State administrations are central in this regard.[93] Compared to the general public, the Court's compliance constituencies are likely to take a closer look at the professional expertise of judges and the well-functioning of the Court's administration to assess the Court and adjust their compliance and cooperation behavior accordingly.[94]

For domestic judges, an important question when cooperating with the ECJ, notably through the preliminary reference procedure, concerns their impressions of CJEU judges' credentials, loyalties and expertise. As Michal Bobek, putting himself in the shoes of a domestic judge, asks poignantly: 'Do those people in that Luxembourg ivory tower/glass house/sky castle understand what is going on down here?'[95] From this perspective, two features of the CJEU's governance model might help foster the trust domestic judges invest in the CJEU. First, the fact, that, in terms of judicial governance, the CJEU very much looks like a domestic court. The Court's Code of Conduct, an instrument not existent at the CJEU's sibling in Strasbourg,[96] and the tight regime of case management present CJEU judges as committed and hard working professionals, who are exposed to the same exigencies as a standard domestic judge (time pressure, performance targets, etc.). Second, also the Article 255 Panel can support such an impression. In the scholarly literature on the topic, which is often authored by practicing lawyers, the assessment of the Panel is generally favorable and its contribution to the quality of CJEU judges and their independence is underlined.[97] In that sense it might also help that the 255 Panel is

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[92] Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, in 5 LIVING REVIEWS IN EUROPEAN GOVERNANCE 8 (2010).

[93] *See* for instance, Anne-Marie Burley and Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 INTERNATIONAL ORGANIZATION 41 (1993); Olof Larsson, Daniel Naurin, Mattias Derlén & Johan Lindholm, *Speaking law to power: the strategic use of precedent of the Court of Justice of the European Union*, 50 COMPARATIVE POLITICAL STUDIES 879, 884-886 (2017).

[94] On trust as a key factor for the cooperation of domestic judges with the Court, s*ee* Juan A. Mayoral, *In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe*, 55 JOURNAL OF COMMON MARKET STUDIES 551 (2017).

[95] Michal Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts, in* JUDGING EUROPE'S JUDGES. THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 197, 218 (Maurice Adams, Henri de Waele, Johan Meeusen & Gert Straetmans eds., 2013).

[96] *See*, Başak Çalı & Stewart Cunningham, *Judicial Self Government and the sui generis case of the European Court of Human Rights*, 19 GERMAN L.J. (2018).

[97] *See* for instance, Karpenstein, *supra* note 72; further, Dominique Ritleng, *The Independence and Legitimacy of the European Court of Justice, in* INDEPENDENCE AND LEGITIMACY IN THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION 83, 100 (Dominique Ritleng ed., 2016).

composed of highly renowned domestic judges, sending a signal to domestic courts that they are represented in the selection of the European judiciary.[98]

III. Shielding CJEU members: JSG and judicial independence

Closely linked to the question of judicial authority, is the issue of independence. In a 2014 study, Transparency International has concluded that there is no evidence that the Member States, other entities or individuals exercise undue influence on the Court's decisions or on individual judges.[99] That judges' *de facto* independence is strong is surprising given that their *de jure* independence is generally seen as a weak spot in the Court's institutional design. For a long time, there has been a critique that the short term of office of six years[100] and the possibility of indefinite reappointments might undermine judicial independence, making judges vulnerable to political influence if they seek to be reappointed.[101]

However, in practice, these threats are reduced through a number of institutional mechanisms that foster the anonymity of CJEU members. The absence of dissenting or concurring opinions is a first instrument to shield judges from undue influence.[102] From the perspective of JSG, the intensive regulation and peer review of judicial conduct[103] arguably contribute to Court members' *de facto* independence. All external activities require prior authorization by the CJEU members' peers. Judges and Advocates General are hence informed on the outside activities of their colleagues, which turns questions of independence from a virtue of the individual Court member to being also a matter that affects the whole Court. A similar rule has been adopted for the Court's law clerks. They need to get permission to take part in external activities by their judge or Advocate General and the Court's President. The content of both, publications as well as oral

[98] Bobek, *supra* note 73, at 303. On the current Panel sit for instance Carlos Lesmes Serrano, President of the Spanish Supreme Court; Andreas Voßkuhle, President of the German Federal Constitutional Court; and Mirosław Wyrzykowski, a former judge at the Polish Constitutional Court.

[99] *See* Hancisse, McMenamin, Perera & Patz, *supra* note 78, at 125.

[100] Article 253 paragraphs 1 and 4 and Article 254 paragraph 2 TFEU.

[101] Jiří Malenovsky, *Les éléments constitutifs du mandat des juges de la Cour de justice à l'épreuve du temps: l'iceberg commence à fondre*, 4 IL DIRITTO DELL'UNIONE EUROPEA 801, 817-823 (2011); from the early years, HANS-ULRICH BÄCHLE, DIE RECHTSSTELLUNG DER RICHTER AM GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN 129 (1961).

[102] *See*, for instance, Josef Azizi, *Unveiling the EU Courts' Internal Decision-Making Process: A Case for Dissenting Opinions?* 12 ERA FORUM 49 (2011).

[103] *See*, above, Part B.II.2.

presentations at conferences or other events, needs to be communicated at least one month in advance.[104]

This peer review procedure is complemented by the work of the Court's press department, which serves as a filter for the CJEU's contacts with the outer world. In its relations with the public and the press, the Press department observes a strict policy on what kind of case-relevant information can be released.[105] For instance, before the hearing, neither the names of the judges composing the bench nor of the Advocate General writing the Opinion must be given away. Also, the status of the proceedings, the date of the deliberations, or the closure of the written part of the proceedings have to be held back. The press department, moreover, works as a filter and buffer for interviews with members of the Court. Every interview needs to be organized through the department's Head of Unit. If accepted by the member of the Court, an official from the department is present at interviews. Moreover, every press interview is read and declassified by the press department.[106] To be sure, such mechanisms cannot guarantee CJEU members' independence, but they create an environment, where securing independence is seen as a collective task.

D. The Achilles' heels of JSG: transparency and accountability

So far, we have discussed the positive effects of the CJEU's model of JSG. It is to the more challenging aspects that we turn now. There are a number of thorny issues strong forms of JSG generally raise, notably ensuring that an institution does not develop a life of its own and that a self-governed court and its judicial members can be held accountable in case of mismanagement.[107] At the CJEU, questions of transparency (I.) and accountability (II.) in relation to the Court's administrative tasks have been tackled by and large in a convincing manner. Nevertheless, there remain a number of points where room for improvement exists.

I. Transparency and JSG at the CJEU

Compared to most international courts,[108] JSG at the CJEU is bound to respect demanding standards of transparency. When acting in an administrative capacity, the CJEU has, in

[104] Article 3 para 1 subpara 3 and Article 4 para 1 *Décision du 17 février 2009 portant adoption de règles de bonne conduite des référendaires* (on file with the author).

[105] *Vademecum: Unité de Presse et de l'Information* (June 2015), (on file with the author) at 16.

[106] *Id*., at 13.

[107] *See*, Kosař, *supra* note 3.

[108] *See*, Çalı & Cunningham, *supra* note 96.

principle, to conform to the same transparency requirements as any other EU institution.[109] Since the early 2000s, with the EU's overall focus on good governance, these requirements have become more demanding. According to Article 15 paragraph 3 TFEU, the Court, when performing administrative tasks, has to grant full access to documents.[110] While the Court does not publish a list of administrative documents for which access can be requested,[111] if you know what you are looking for, the system works well.[112] To be sure, where to draw the line to documents drafted in a judicial capacity is a tricky question.[113] Gradually, the Court is even becoming more proactive in providing information, such as on the outside activities of its members, which are published online.[114]

An important gap in terms of transparency concerns the activities of the 255 Panel. Despite its influential role in judicial appointments, the Panel does not publish its assessments on individual candidates' suitability for office. They are only submitted to the Member States. All requests for being granted access to the Panel's opinions have been turned down.[115] There is certainly a balance to be struck between ensuring, on the one hand, that the best candidates apply and that private data is protected but that, on the other hand, the public is informed about candidates' credentials and can understand the reasons why individual candidates are considered suitable or not.[116] Yet, at the moment, such balancing is not

[109] In detail, Alberto Alemanno & Oana Stefan, *Openness at the Court of Justice of the European Union: Toppling a Taboo* 51 COMMON MARKET LAW REVIEW 97, 108-113 (2014).

[110] The procedure for access to documents has been concretized in a decision, which sets out the steps for the application process and regulates review and appeal procedures in case access to documents is denied; *see* the Decision of the Court of Justice of the European Union of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2016/C 445/03).

[111] Alemanno & Stefan, *supra* note 109, at 113.

[112] This article, being based on a number of documents that have been received through the CJEU's transparency regime, is good proof of this.

[113] Alemanno & Stefan, *supra* note 109, at 113-116.

[114] For the first time, during the 2014 budgetary discharge procedure, the Court revealed to the European Parliament a list of 158 outside activities of its members. However, it was not mentioned which CJEU members took part in the individual events, *see* CJEU, *Décharge 2014. Questionnaire adressé à la Cour de justice. Complément de réponse aux questions n° 9 et 10: Liste des activités exercées par les Membres des trois juridictions ayant eu un impact sur le budget de l'Union européenne*; for the year 2017 a list of outside activities linking CJEU members names to the events has been published by the Court online; *see* https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/tra-doc-en-div-c-0000-2018-201800885-05_01.pdf.

[115] For the reasons given by the Council and the critque *see*, Anastasia Eriksson, Mingzhu Li, Omar Shalaby, Alberto Alemanno & Paige Morrow, *Transparent Selection of Judges for EU Courts: Complaint to the European Ombudsman*, HEC Paris Research Paper No. LAW-2017-1239.

[116] On how to strike the balance, *see* Alemanno, *supra* note 69.

performed. Rather, access is completely ruled out. The shielded nature of the Panel's work is not primarily the Court's fault. The Panel is institutionally linked to the Council and not to the Court. Nevertheless, given the CJEU's important role in setting up the Panel, notably by proposing its operating rules,[117] the Court can be considered somewhat complicit in creating the problems the Panel raises from the perspective of transparency. In the literature, proposals have been made how to improve the situation.[118]

Difficult transparency issues arise when the CJEU leaves the field of court administration *stricto sensu* and enters the legislative realm. Since the 2009 Treaty of Lisbon, according to Article 281 paragraph 2 TFEU, the Court can initiate changes to its Statute, the European Parliament and the Council decide as co-legislators. Problems such a legislative role for the Court entail, became apparent in the recent controversial process of doubling the number of GC judges.[119] Being part of the legislative process, the Court engaged in lobbying to promote its proposal. ECJ President Skouris visited the President of the European Parliament, Martin Schulz, other ECJ members met with the European People's Party group.[120] Moreover, French media reported on a meeting between President Skouris and the German Ministers of Justice and Finance, Heiko Maas and Wolfgang Schäuble, in Berlin to discuss the reform of the GC.[121] Yet, these visits were not officially communicated. Moreover, documents emanating from the Court in the course of the legislative procedure were often undated, unregistered, unsigned and not made publically available.[122] Given that such prominent role for the Court in the EU's legislative process is a rather new development, it seems advisable to look how other independent EU institutions handle transparency requirements when they engage in political consultations, for the Court to properly adjust its transparency standards for such cases.[123]

II. Accountability and JSG at the CJEU

Accountability is probably the most difficult terrain when thinking about JSG. Even if courts are held accountable for their activities performed in court administration only, the line to negatively affecting a court's judicial independence is easily crossed. This applies in

[117] *See supra* note 72.

[118] *See*, notably, Eriksson, Li, Shalaby, Alemanno & Morrow, *supra* note 115.

[119] *See supra* note 56.

[120] Dehousse, *supra* note 4, at 67.

[121] Jean Quatremer, 'Le superjuge frôle le hors-jeu', Libération (6/7 June 2015) p. 16.

[122] Dehousse, *supra* note 4, at 65.

[123] Executive Board Members of the European Central Bank, for instance, publish their diaries, with a lag of three months, including appointments with external parties; *see*, https://www.ecb.europa.eu/ecb/orga/transparency/calendars-of-the-EB-members/html/index.en.html.

particular when the individual behavior of judges is at stake. Accordingly, the individual accountability of CJEU members is regulated in-house. There have been very few cases, where the behavior of judges or Advocates General has been subject to disciplinary measures.[124] The rules on deprivation of office of a judge or Advocate General have never been applied in practice.[125] The occasional lift of immunity has normally been requested by judges themselves.[126] There has been one case investigated into by the European anti-fraud office OLAF.[127] However, these remain individual, rare and scattered instances of individual accountability.

Of greater practical relevance, is the question of institutional accountability. The key mechanism in this regard is the EU's budgetary process, the key player the European Parliament.[128] Every year, the Court explains its administrative activities in a management report. Based on an assessment by the European Court of Auditors, a recommendation by the Council and a report by the European Parliament's Committee on Budgetary Control, the European Parliament grants discharge to the Registrar of the Court.[129] The Parliament has developed the practice to request additional information from the CJEU in the form of questionnaires and adds observations to its discharge decisions, commenting on problems and proposing reforms.

While the decision on discharge is first and foremost a political act, without immediate effect for the Court's budget,[130] Parliament's observations nevertheless carry significant

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[124] *See* Hancisse, McMenamin, Perera & Patz, *supra* note 78, at 129.

[125] *See* Article 6 of the Court's Statute.

[126] Between 2004 and 2013 the immunity of a CJEU judge or Advocate General has been lifted ten times, only one included a request by a third party; Hancisse, McMenamin, Perera & Patz, *supra* note 78, at 129.

[127] *2012 discharge questionnaire to the European Court of Justice*, (on file with the author) at 4; for the competences of OLAF as regards the CJEU and the modalities of their cooperation *see*, Décision de la Cour du 12 juillet 2011 portant modification de la décision du 26 octobre 1999 relative aux conditions et modalités des enquêtes internes en matière de lutte contre la fraude, la corruption et toute activité illégale préjudiciable aux intérêts des Communautés.

[128] In detail, Christoph Krenn, *The European Court of Justice's Financial Accountability. How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process*, 13 EUROPEAN CONSTITUTIONAL LAW REVIEW, 253 (2017).

[129] Formally, according to Article 319 TFEU, discharge is granted to the Commission for the implementation of the budget. In practice, however, the European Parliament grants individual discharge to those in charge of implementing the budget within the specific institution. The Registrar is, under the supervision of the ECJ's president, responsible for the implementation of the CJEU's budget.

[130] Diemut Theato*, Die Haushaltskontrolle durch das EP und sein Beitrag zur Entwicklung eines europäischen Sanktionsrechts*, *in* EUROPÄISCHE DEMOKRATIE 111 (Josef Drexl ed., 1999). In case of disapproval it does not lead to a budgetary impasse for the Court, *see*, Siegfried Magiera, *Artikel 319 AEUV, in* DAS RECHT DER EUROPÄISCHEN UNION, *supra* note 72, at margin number 9.

weight. Article 166 of the EU Financial Regulation foresees the duty to 'take all appropriate steps to act on the observations accompanying the European Parliament's discharge decision […].'[131] Moreover, a failure to reply and act upon Parliament's objections will lead to insistent inquiry during the next discharge procedure and can eventually lead to a reduction of appropriations.[132] Management issues that were addressed by Parliament include invoicing irregularities,[133] the Court of Justice's expenditure on buildings,[134] the non-official use of official cars by members of the Court,[135] gender balance within the Court's administrative departments,[136] or the frequency of judicial members' visits to academic conferences.[137]

In the course of the budgetary process, the European Parliament does not prescribe the Court *en détail* how to organize the institution, but it checks for mismanagement and gives political guidance on broader issues of court administration. A constructive dialogue has developed over the past years. The Court is eager to underline that it responds quickly and aptly to the Parliament's proposals.[138] The Parliament, on the other side, has resisted turning the budgetary process into an assessment of the Court's judicial decisions. Rather, it has shown itself committed to ensuring an adequate financing for the Court.[139] The Parliament generally acts vis-à-vis the Council as a guardian for the Court's financial well-

[131] Art. 166 para. 1 of the 2012 Financial Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council [2012] OJ L298/1.

[132] As regards the CJEU this was threatened by the Parliament in its 2004 discharge resolution, *see* [2004] OJ L330/141, point 15, regarding the non-official car use by members of the court and the system of salary weightings.

[133] European Parliament, Discharge decision for the financial year 2000, [2002] OJ L158/66, para. 19.

[134] European Court of Auditors, Special Report no 5/2000, [2000] OJ C109.

[135] European Parliament, Discharge decision for the financial year 2002, [2004] OJ L330/140, paras. 5-15.

[136] European Parliament decision of 18 April 2018 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2016, Section IV – Court of Justice (2017/2139(DEC), para 37.

[137] *2013 discharge. Questionnaire to the European Court of Justice*, at 10 (on file with the author).

[138] Following up the observations or recommendations in the discharge resolution of the European Parliament of 3 April 2014 for the year 2012. Replies given and steps taken by the Court of Justice. ('The Court has made every effort to act upon [the observations/recommendations expressed by the EP] as soon as possible.').

[139] Already in the early 1980s, in the wake of severe budget cuts, the Parliament blocked attempts by the Council to include the Court among those institutions whose budget should be cut by five percent; *see* European Parliament, Report drawn up on behalf of the Committee on Budgets on Section IV – Court of Justice – of the draft general budget of the European Communities for the financial year 1983 (25 October 1982) Document 1-781/82.

being,[140] while at the same time critically supervising the Court's institutional development. To be sure, not all proposals by the Parliament can unequivocally be supported.[141] Yet, in principle, the budgetary process has proven a meaningful instrument to ensure that the CJEU is guided and held to account for its administrative governance, while respecting the Court's institutional independence.

E. Conclusion

The CJEU's particular version of JSG, which has been incrementally developed over the course of the last 65 years, can be associated with a number of positive effects. This has been the central argument of this contribution. The collegial nature of self-government at the Court provides an institutional environment in which conflicts on how to govern the institution can, in principle, be managed internally and successfully. The establishment of the 255 expert panel can be seen to increase confidence in the Court's judges, notably by the Court's key compliance constituencies. Moreover, peer review of CJEU members' conduct while in office, as well as the buffer the Court's press department provides, help to protect judicial independence. At the same time, problematic side effects of JSG, such as a lack of transparency and accountability, have been largely avoided. This is not to say that room for improvement does not exist. Notably, when it comes to more recent developments, such as the influential role of the 255 Panel on judicial appointments or the Court's legislative tasks in amending its own Statute, more transparency would be required.

This contribution has highlighted the legal architecture of administrative governance at the CJEU. It has discussed its many strong and its few problematic features. Yet, ultimately, the success of JSG is dependent on conditions institutional design can only induce, but not guarantee. The most inclusive and collegial governance structure is of little use if collegiality is not lived. The most elaborate rules on financial accountability are meaningless if an accountability relationship is abused. With very few exceptions,[142] collegiality (internally) and institutional dialogue (externally) have been the background norms of JSG at the CJEU. Whether they can be upheld, will determine whether JSG will also in the future be a bedrock for the CJEU's institutional success.

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[140] *See*, for instance, the Court's statement that 'budgetary resources relating to IT functioning and development should be preserved by the budgetary authority, as done thanks to the amendments supported by the European Parliament during last years.' *See*, *Discharge 2011: questions from M. Kalfin* (on file with the author), at 4.

[141] For an analysis and critique *see*, Krenn, *supra* note 128.

[142] *See*, for instance, *supra* notes 50 and 56.

Articles

Court Presidents: The Missing Piece in the Puzzle of Judicial Governance

By Adam Blisa[*] & David Kosař[**]

Abstract:

The aim of this paper is to provide a new comprehensive understanding of roles of court presidents in judicial governance in Europe. It argues that in order to better understand the role of court presidents in comparative perspective it is necessary to unpack their power into smaller components that can be analyzed separately. We define seven such components: judicial career, jurisprudential, administrative, financial, ambassadorial, and media power, and ancillary powers as a residual category. Subsequently, we zero in on 13 European jurisdictions and rate them according to the strength of their court presidents' powers. By doing so we are developing a Court President Power Index. Based on this Index we question the claim that Western court presidents are always weaker than their Eastern European counterparts and argue that powers of court presidents diverge both within Western Europe and within Eastern Europe, and hence it is difficult to draw the easy line along the West/East axis on this ground. Finally, we problematize our Court President Power Index and show that powers in the meaning of faculty do not necessarily translate into influence since various contingent circumstances (such as the length of court presidents' terms of office, information asymmetry, the structure of the judiciary, the existence of competing judicial self-governance bodies, the role of individuals, the proximity of court presidents to political leaders, the legal profession, legal culture, and the political environment) affect to what extent court presidents may exploit their powers in practice.

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When Viktor Orbán's regime ousted the sitting Chief Justice of the Hungarian Supreme Court, András Baka,[1] who dared to criticize the judicial reforms adopted by Fidesz, many stakeholders were appalled. Most of them did not even notice that Orbán also got rid of the Supreme Court Vice-President (by statutory amendment)[2] and many lower court presidents (by reducing the compulsory retirement age for judges).[3] A few years later, the Law and Justice Government in Poland followed this script. Kaczyński gave his Minister of Justice Zbigniew Ziobro a six-month window, which allowed Ziobro to dismiss court presidents and appoint new ones without consultation. Ziobro fully exploited this "window of opportunity" to replace almost 150 court presidents and vice presidents.[4] Law and Justice also reduced the compulsory retirement age for judges from 70 to 65 years, which "by accident" applied also to the Polish Supreme Court President, Małgorzata Gersdorf, who turned 65 in 2017 and whose constitutional term of office was supposed to end only in 2020.[5]

However, this is just the tip of the iceberg.[6] In fact, political leaders in the CEE region dismissed (or attempted to dismiss) not only András Baka and Małgorzata Gersdorf, but also Supreme Court Chief Justices in Croatia[7] and Czechia,[8] and court presidents in Slovakia.[9] Most recently, it was reported that the Bulgarian Chief Justice is under pressure

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[1] *See* Attila Vincze, *Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment Baka v. Hungary*, 21 EUROPEAN PUBLIC LAW 445 (2015); and David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law,* 10 HAGUE JOURNAL ON THE RULE OF LAW 83 (2018).

[2] *See* Erményi v Hungary, EUR. CT. H. R. (Judgment of 22 November 2016, app. no. 22254/14); and Kosař & Šipulová, *supra* note 1.

[3] *See* Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50 C.M.L.R. 1145 (2013); Tomás Gyulavári & Nikolett Hős, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*. 42 INDUSTRIAL LAW JOURNAL 289 (2013); and Gábor Halmai, *The early retirement age of the Hungarian judges*, *in* EU LAW STORIES. CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471–488 (Fernanda Nicola & Bill Davis, eds., Cambridge University Press 2017).

[4] *See* Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, in this issue; and Adam Bodnar, *Europe can save Poland from darkness*, POLITICO (Apr. 9, 2018), https://www.politico.eu/article/poland-judiciary-rule-of-law-europe-must-intervene/.

[5] *See* Śledzińska-Simon, *supra* note 4; and Wojciech Sadurski, *Polish Chief Justice of the Supreme Court Under Pressure: What Now?* VERFBLOG (Jul. 5, 2018), https://verfassungsblog.de/polish-chief-justice-of-the-supreme-court-under-pressure-what-now/.

[6] Kosař & Šipulová, *supra* note 1.

[7] Alan Uzelac, *Role and Status of Judges in Croatia*, *in* RICHTERBILD UND RECHTSREFORM IN MITTELEUROPA (Paul Oberhammer ed., Manzsche Verlags 2001).

[8] Michal Bobek, *The Administration of Courts in the Czech Republic – In Search of a Constitutional Balance*, 16 EUROPEAN PUBLIC LAW 251 (2010).

from the Chief Prosecutor.[10] When it comes to lower court presidents, their discretionary dismissals also were[11] or have been[12] a common practice in the region. For instance, each Slovak minister of justice since 1998 who has remained in office for two or more years has replaced more than 25% of all court presidents.[13] Three of them replaced more than 50% of court presidents,[14] which is much more than Law and Justice in Poland within the last three years. A similar practice flourishes in Ukraine, where 'recalcitrant' court presidents have often faced reprisals, both before[15] and after[16] the Euromaidan.

These controversial moves drew significant attention to the role of court presidents in CEE judiciaries. What powers do the CEE court presidents have if it is so important to the political leaders to install their own people in these positions? Put differently, there must be something special about their role within the court administration. Otherwise, political leaders would not care so much about them. Several scholars showed what broad powers some court presidents in CEE wield,[17] which may in turn explain why the CEE political leaders pay so much attention to the selection of court presidents and are even willing to dismiss incumbent court presidents, despite heavy political costs on the domestic as well as international level.[18]

One may object that replacing incumbent court presidents by judges loyal to the new populist regime has little bearing on the greater scheme of things, especially in comparison

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[9] DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 279–80 (2016); and Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to the Slovak Republic (November 27–29, 2000), E/CN.4/2001/65/Add.3, paras. 27–33.

[10] Radosveta Vassileva, *The Disheartening Speech by the President of Bulgaria's Supreme Court Which Nobody in Brussels Noticed*, VERFBLOG (July 11, 2018), https://verfassungsblog.de/the-disheartening-speech-by-the-president-of-bulgarias-supreme-court-which-nobody-in-brussels-noticed/.

[11] *See* David Kosař, *Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice,* 13 EUROPEAN CONST. LAW R. 96 (2017).

[12] *See* Samuel Spáč and David Kosař, *Court Presidents in Slovakia: From Transmission Belts to Transmission Belts?*, (unpublished manuscript, on file with authors, 2018).

[13] *Ibid*.

[14] *Ibid*.

[15] *See* e.g. Denisov v Ukraine, EUR. CT. H. R. (Judgment of 25 September 2018, app. no. 76639/11) (concerning the president of the influential Kyiv Administrative Court of Appeal).

[16] Maria Popova, *Ukraine's Judiciary after Euromaidan*, (unpublished manuscript, on file with authors 2018).

[17] *See* e.g. MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012); Lydia F. Müller, *Judicial Administration in Transitional Eastern Countries*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 937 (Anja Seibert-Fohr ed., 2012); and Kosař, *supra* note 9, at 279–280.

[18] *See* the examples mentioned above.

to attacks on constitutional courts, court-packing strategies, weakening judicial councils, and capturing the process of selection of judges. However, as shown above, populist political leaders in Hungary, Poland, and other CEE countries care about the control of court presidents. They care about court presidents, because they know that it is a powerful channel of politicization and taming of the judiciary. They might favor this channel also for other reasons – because it is less visible and more difficult to fight, because it allows for continual control of the judiciary (in contrast to single acts such as selection or promotion), or because loyal court presidents may serve as a valuable source of information for the political leaders about what is going on within the judiciary, which in turn helps them to suppress the potential revolt of judges from the outset.[19] We should thus care as well. If we want to prevent (or at least slow down) the capture of the judiciary by populist leaders, we need to know what CEE court presidents do, who they are, what are their motivations, why CEE political leaders replace them, and what the potential channels of politicization of the judiciary via court presidents are.

However, the selection of court presidents has become increasingly controversial also in Western Europe. As early as in 1997, the Prince of Liechtenstein's refusal to reappoint sitting president Wille for yet another term as the President of the Liechtenstein Administrative Court due to Mr. Wille's public statements regarding the scope of the Prince's power caused an outcry that eventually ended up before the Grand Chamber of the European Court of Human Rights.[20] Even in Norway, where judicial politics have rarely been discussed in public, the most recent appointment to the position of the Chief Justice drew severe criticism from the political opposition, scholars as well as the insiders.[21]

Beyond Europe, some of the stories regarding court presidents are even more dramatic. When the Pakistani President suspended the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, in 2007, it caused a nationwide popular mass protest movement led by lawyers who eventually succeeded in getting Mr. Chaudhry reinstated to the office of Chief Justice.[22] In contrast, in Peru[23] and Indonesia,[24] chief justices had to resign amid corruption

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[19] *See* also notes 255-257 below.

[20] *Wille v. Liechtenstein*, EUR. CT. H. R. (Judgment of the Grand Chamber of 28 October 1999, app. no. 28396/95).

[21] Anine Kierulf, *Norway: New Chief Justice Appointed to the Supreme Court*, I-CONNECT (March 1, 2016), http://www.iconnectblog.com/2016/03/norway-new-chief-justice/.

[22] *See* Ilyas Khan, *Judge row prompts Pakistan democracy questions,* BBC NEWS (March 12, 2007), http://news.bbc.co.uk/2/hi/south_asia/6442829.stm; and *Pakistan's top judge reinstated,* BBC NEWS (July 20, 2007), http://news.bbc.co.uk/2/hi/south_asia/6907685.stm. For more details, *see* Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf,* 35 LAW & SOCIAL INQUIRY 985 (2010).

[23] *See Peru political turmoil: Supreme court president resigns over tapes scandal*, BBC NEWS (July 19, 2018), https://www.bbc.com/news/world-latin-america-44892884.

scandals. In all three countries, these events led to constitutional crises. Even established democracies are not spared such dramas, as the Tim Carmody affair attests. When Tim Carmody was appointed the Chief Justice of Queensland by Premier Campbell Newman in 2014, it tore the Australian legal profession apart and eventually evolved into Australia's greatest judicial crisis.[25]

The role of court presidents became more visible at international and supranational courts too. For instance, some actions of the President of the Court of Justice of the European Union, Vassilios Skouris, who presided over the CJEU from 2003 to 2015, became the subject of scholarly criticism. First, the manner of his involvement in the judicial reform of the CJEU and the subsequent lobbying for it raised serious concerns.[26] Second, Skouris' actions within the Court of Justice itself caused a split between him and the President of the General Court, Marc Jaeger.[27] No controversy on such a scale has reached the Strasbourg Court so far, but even within the Strasbourg community, everybody knows how important the ECtHR President is. For instance, both Luzius Wildhaber and Jean-Paul Costa acted as judicial diplomats, and the latter played a pivotal role in persuading Russia to ratify Protocol No. 14 to the European Convention on Human Rights.[28] After the election of Sir Nicholas Bratza to the post of the ECtHR President, many insiders suggested that this move was motivated by the need to appease the increasingly critical Government of the United Kingdom. The growing role of new internal judicial self-governance bodies within the ECtHR, such as the Bureau,[29] makes the selection of the ECtHR's president even more important.

Given this ample evidence of how important court presidents are in running the judiciaries, there is surprisingly little written on this topic.[30] The aim of this article is to reduce this gap

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[24] *See*, e.g., Joe Cochrane, *Top Indonesian Judge Held in Corruption Case*, THE NEW YORK TIMES (October 3, 2013), https://www.nytimes.com/2013/10/04/world/asia/indonesias-top-judge-held-in-corruption-case.html; and *Ex-head of Indonesia's constitutional court jailed for life for graft,* REUTERS (June 30, 2014), https://uk.reuters.com/article/uk-indonesia-corruption/ex-head-of-indonesias-constitutional-court-jailed-for-life-for-graft-idUKKBN0F51Z420140630.

[25] *See* REBECCA ANANIAN-WELSH, GABRIELLE APPLEBY & ANDREW LYNCH, THE TIM CARMODY AFFAIR: AUSTRALIA'S GREATEST JUDICIAL CRISIS (2016).

[26] Christoph Krenn, *Governing the European Court of Justice: Self-governance as a Model for Success*, in this issue.

[27] *See* Duncan Robinson, *The 1st rule of ECJ fight club…is about to be broken*, FINANCIAL TIMES: BRUSSELS BLOG (April 27, 2015), http://blogs.ft.com/brusselsblog/2015/04/27/the-1st-rule-of-ecj-flight-club-is-about-to-be-broken.

[28] *See* Jennifer W. Reis, *Protocol No. 14 ECHR and Russian No. 14: The Current State of Affairs*, 22 HARVARD HUMAN RIGHTS JOURNAL 293 (2009).

[29] *See* Başak Çalı & Stewart Cunningham, *Judicial Self Government and the sui generis case of the European Court of Human Rights*, in this issue.

[30] For more details, *see* Part A.

and to provide a new comprehensive understanding of roles of court presidents in judicial governance in Europe. In order to do so, we identify powers of court presidents and then conduct a multiple-country comparison, which results in the Court Presidents Power Index. By doing so, we make the following contributions to the existing literature on court administration and judicial studies more generally. First, we provide the first comprehensive typology of powers of court presidents that is divorced from the peculiarities of a single jurisdiction and allows for a comparison within and across jurisdictions. Second, we challenge the conventional wisdom[31] that there is a clear West/East division regarding the powers of court presidents in Europe. Third, our approach is also novel in that we study transnational courts and domestic courts together. We believe that both theoretically and empirically there is much to gain from comparisons between these two levels. Therefore, we zero in not only on domestic court presidents within Europe, but also on the role of presidents of the European Court of Human Rights and the Court of Justice of the European Union.

More specifically, we argue that in order to better understand the role of court presidents in comparative perspective it is necessary to unpack their power into smaller components that can be analyzed separately. We define seven such components: power over judicial careers, jurisprudential power, administrative power, financial power, ambassadorial power, media power, and the residual category of ancillary powers. Regarding the abovementioned West/East division, we argue that powers of court presidents diverge both within Western Europe and within Eastern Europe and thus it is difficult to draw a simple line along the West/East axis on this ground. When we add both supranational European courts to the picture, it becomes even clearer that there is no consensus in Europe regarding the role of court presidents.

This article proceeds as follows. Part A summarizes the state of the art and shows that we still know little about court presidents. Part B introduces a novel taxonomy of powers of court presidents. In doing so, it zeroes in on both the de iure and de facto powers and, given the scarcity of the relevant literature, uses examples not only from the European jurisdictions covered by this special issue, but from all over the world. Part C then focuses on the selected European jurisdictions and rates them according to the strength of their court presidents' powers. This rating results in the Court Presidents Power Index. Subsequently, we identify five types of court presidents and revisit the view that there are sharp differences between the roles of court presidents in the West Europe on the one hand and the Eastern Europe on the other. Part D problematizes the Court Presidents Power Index and shows what contingent circumstances may affect to what extent court presidents can exploit their powers in practice. Part E concludes.

[31] *See* Part D of this article.

A. What do We Know about the Court Presidents?: Summarizing the State of the Art

It is the most visible institutions, such as judicial councils or judicial appointment boards, that are the usual subject of judicial self-governance (JSG) studies.[32] This is caused by the tendency to squeeze all forms of judicial self-governance into the existing models of court administration. However, there *are* also other JSG bodies.[33] The court presidents are one of them. Apart from the Chief Justice of the Supreme Court of the United States,[34] court presidents in other jurisdictions (and even court presidents of *other* federal and state courts in the United States) receive significantly less attention than judicial councils and, if they do, it is usually only in connection with other, bigger issues, such as judicial independence, rather than the main focus of the inquiry.

This is surprising, given the fact that historically, in many countries characterized by bureaucratic-type judiciaries, court presidents used to and often continue to play an important role. This is so especially in the CEE countries with the Austro-German heritage of administration of courts where court presidents are especially powerful and enjoy a peculiar status as both judges and administrators.[35] Such position makes them significant players in so many areas that we could even say they influence not only judges' careers right from the beginning to the very end, be it in their selection and appointment,

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[32] For a thorough introduction, *see* David Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Government in Europe,* in this issue.

[33] We define JSG body as a body with at least one judge whose primary function, entrenched in a legal norm, is to decide about issues regarding court administration and/or the career of a judge, and/or advise those who decide about such issues. *See* also Kosař, *supra* note 32.

[34] DAVID J. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964); Sandra L. Wood, Linda C. Keith, Drew N. Lanier & Ayo Ogundele, *Opinion Assignment and the Chief Justice*, 81 SOCIAL SCIENCE QUARTERLY 798 (2000); Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative Or a Job for the Court?,* 22 J. OF L. & POLITICS 231 (2006); Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON LAW REVIEW 717 (2011); Drew N. Lanier, *Acclimation Effects and the Chief Justice: The Influence of Tenure on the Decisional Behavior of the Court's Leader, 1888–2007*, 39 AMERICAN POLITICS RESEARCH 682 (2011); DAVID J. DANELSKI & ARTEMUS WARD, THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE (2016); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 421 (1996); Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POLITICAL RESEARCH QUARTERLY 551 (2004); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1729 (2006); G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1463 (2006); Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 276 (2007); *see* also the biographies of Chief Justices, e. g. KENNETH BERNARD UMBREIT, OUR ELEVEN CHIEF JUSTICES (1938); Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 YALE L. J. 405 (1975); HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835 (1997); EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969–1986 (2000); and R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY (2005).

[35] Bobek, *supra* note 8, at 251, 252–254.

evaluation, promotion and reassignment,[36] and in holding them to account,[37] but also their day-to-day work by creating work schedules[38] and assigning cases,[39] or controlling parts of salaries[40] and discretionary perks.[41]

Looking into the powers of CEE countries' court presidents and the power relations between them and other branches of power, we see that they can take up the role of a principal JSG actor.[42] Such vast power of court presidents is understandably not at all unproblematic as, coupled with a strong position in another JSG body such as a judicial council, it could lead to abuse and accountability perversions.[43] The court presidents' importance is by no means limited to the CEE countries – influential court presidents exist also in Latin America,[44] the United States[45] or Asian countries.[46] An extensive literature is

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[36] A very rich source of information on court presidents not only in CEE countries, but also in some of the developed western democracies, are the national reports in JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed., 2012); especially by Adam Bodnar and Łukasz Bojarski on Poland at 667, by Zoltán Fleck on Hungary at 793, by Ramona Coman and Cristina Dallara on Romania at 835, by Olga Schwartz and Elga Sykiainen on Russia at 971.

[37] DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE 43–4 (2010); *see* also David Kosař, *The Least Accountable Branch,* 11 INT'L J. OF CONST. LAW 234 (2013) setting straight some claims that Daniela Piana makes in her book.

[38] Giuseppe Di Federico, *Judicial Independence in Italy, in* Seibert-Fohr, *supra* note 17, at 357, 378–379.

[39] Schwartz & Sykiainen, *supra* note 36, at 1019–1021.

[40] This was the case of Slovakia, *see* Kosař, *supra* note 9, at 279–280.

[41] Peter H. Solomon, *Authoritarian legality and informal practices: Judges, lawyers and the state in Russia and China*, 43 COMMUNIST AND POST-COMMUNIST STUDIES 351, 354 (2010); *see* also Peter H. Solomon, *The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability*, *in* Seibert-Fohr, *supra* note 17, at 909. On judicial government in post-Soviet countries, *see* also Popova, *supra* note 17; and Müller, *supra* note 17, at 937.

[42] Kosař, *supra* note 11.

[43] Kosař, *supra* note 9, at 68–72.

[44] Alexei Trochev & Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance*, 2 J. OF L. AND COURTS 67 (2014); MATTHEW C. INGRAM, CRAFTING COURTS IN NEW DEMOCRACIES: THE POLITICS OF SUBNATIONAL JUDICIAL REFORM IN BRAZIL AND MEXICO (Cambridge University Press 2015); Matthew C. Ingram, *Networked Justice: Judges, the Diffusion of Ideas, and Legal Reform Movements in Mexico*, 48 J. LAT. AMER. STUD. 739 (2016); Andrea Pozas-Loyo & Julio Ríos-Figueroa, *The Transformations of the Role of the Mexican Supreme Court,* In JUDICIAL POLITICS IN MEXICO: THE SUPREME COURT AND THE TRANSITION TO DEMOCRACY (Andrea Castagnola & Saúl López Noriega eds., 2016), at 8; Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *The Informal Dimension of Judicial Politics: A Relational Perspective*, 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 413 (2017); and the special issue on 'Courts and Informal Networks' in Volume 39(5) INTERNATIONAL POLITICAL SCIENCE REVIEW (2018).

[45] James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NORTHWESTERN UNIVERSITY LAW REVIEW 1125 (2013), and Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J. OF L. AND COURTS 301 (2014).

devoted specifically to chief justices of apex courts, especially in the United States, and their selection or dismissal.[47] Finally, as court presidents tend to fight back when their powers are being curbed, their powers did not escape the attention of both the ECtHR[48] and other international bodies.[49]

However, all of these scholarly works and policy documents are quite narrowly focused, either on a specific country, on a specific concept such as judicial independence, or on a very specific court president, such as the Chief Justice of the Supreme Court of the United States. What we still lack is an attempt to approach domestic court presidents from a holistic and conceptual point of view that would allow us to compare their functioning across jurisdictions as well as across different tiers of the judiciary within the same jurisdiction.

We know arguably even less about presidents of supranational and international courts.[50] We can learn some fragments about the role of transnational[51] court presidents primarily from their speeches, biographies, *Festschriften* (libri amicorum) and interviews.[52] Beyond that, there is only a limited literature that attempts to address the role of transnational court presidents in a conceptual way. Importantly, Terris, Romano and Swigart showed

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[46] *See* e.g. Ghias, *supra* note 22; Cristina Bonoan, Alejandro Ciencia & Björn Dressel, *Thrilla in Manilla: Impeachment of the Phillipines' Chief Justice*, EAST ASIA FORUM, (March 22, 2012), http://www.eastasiaforum.org/2012/03/22/thrilla-in-manila-impeachment-of-the-philippine-s-chief-justice/; Stefanus Hendrianto, *The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia,* 25 WASHINGTON INTERNATIONAL LAW JOURNAL 489 (2016); STEFANUS HENDRIANTO, LAW AND POLITICS OF CONSTITUTIONAL COURTS: INDONESIA AND THE SEARCH FOR JUDICIAL HEROES (2018); and Rohit De & Tarunabh Khaitan, *In Defence of Constitutionalism*, I-CONNECT (January 19, 2018), http://www.iconnectblog.com/2018/01/ in-defence-of-constitutionalism/.

[47] Pettys, *supra* note 34. *See* also Vincze, *supra* note 1; and Kosař & Šipulová 2018, *supra* note 1; Kierulf, *supra* note 21; and Bonoan, Ciencia & Dressel, *supra* note 46.

[48] *See* e. g. Oleksandr Volkov v. Ukraine, EUR. CT. H. R. (Judgment of 9 January 2013, app. no. 21722/11); Denisov v Ukraine, *supra* note 15; Olujić v. Croatia, EUR. CT. H. R. (Judgment of 5 February 2009, app. no. 22330/05); Harabin v. Slovakia, EUR. CT. H. R. (Judgment of 20 November 2012, app. no. 58688/11); Baka v. Hungary, EUR. CT. H. R. (Judgment of 23 June 2016, app. no. 20261/12); and *Wille v. Liechtenstein*, *supra* note 20.

[49] *See* e. g. the Opinion No. 19 (2016) of the Consultative Council of European Judges, *The Role of Court Presidents*, https://rm.coe.int/1680748232; *Report on the Independence of the Judicial System, Part I: The Independence of Judges*, Venice Commission, CDL-AD(2010)004; or the *Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine*, Venice Commission, CDL-AD(2007)003.

[50] *See* Nino Tsereteli & Hubert Smekal, *The Judicial Self-Government at the International Level: A New Research Agenda,* in this issue.

[51] We are using the term "transnational courts" so as to cover both international and supranational courts.

[52] *See* e.g. Fred J. Bruinsma & Stephan Parmentier, *Interview with Mr. Luzius Wildhaber, President of the ECHR*, 1 NETH. Q. HUM. RTS. 185 (2003); and Fernanda Nicola & Bill Davies, *Judges as Diplomats in Advancing the Rule of Law: A Conversation with President Koen Lenaerts and Justice Stephen Breyer,* 66 AMERICAN UNIVERSITY LAW REVIEW 1159 (2017).

that the presidents of international courts typically serve four distinct functions: judge, administrator, public spokesperson and diplomat.[53] According to them, especially the last role involves the president in direct and frequent contact with governments (because of, among other things, reporting on the work of the courts and securing funds and other resources), which requires a delicate balance between the judicial and political functions of the international court.[54] Even international relations scholars started to touch upon court presidents only recently, in the context of studies on informal judicial practices at international courts[55] and international judicial diplomacy.[56] These studies reveal important details about the jurisprudential[57] and ambassadorial[58] powers of international court presidents, but none of these studies focuses primarily on court presidents.

Beyond the United States,[59] there is not much theorizing about court presidents in the scholarly literature and, if there is, it concerns primarily CEE countries. For instance, several scholars argued, explicitly or implicitly, that Eastern European court presidents naturally wield more power than their counterparts in Western Europe.[60] However, we still do not know whether this claim can be generalized to all jurisdictions in these two regions and why it is so.[61] Court presidents play some role in Daniela Piana's "two-wave-theory" of CEE

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[53] Daniel Terris, Cesare Romano & Leigh Swigart, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 159 (2007).

[54] *Ibid*.

[55] *See* Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the 'Black Box' of International Courts,* MICHIGAN JOURNAL OF INTERNATIONAL LAW (forthcoming).

[56] *See* Theresa Squatrito, *Judicial Diplomacy: International Courts and their Agents on a Mission* (paper presented at ECPR General Conference in Hamburg on 23 August 2018). *See* also Nicole de Silva, *Beyond Adjudication: International Courts' Agency and Entrepreneurship in Governance* (paper presented at LSA conference in Toronto on 7 June 2018).

[57] For instance, the ICJ President takes the lead in framing the ICJ judgment as she circulates the list of issues that she thinks should be addressed in the judgment after the oral hearing, she speaks last at the deliberation of judges and indicates her views of the arguments and rationales that enjoy majority support, and she sits automatically (unless she is in the minority) in the three-person judgment drafting committee. For further details, *see* Dunoff & Pollack, *supra* note 55.

[58] For instance, the ICJ President has been issuing an annual report since 1968, has been presenting this report at the regular session of the UN General Assembly, and initiated a practice of providing a private briefing to the Security Council on the pending cases in 2000 (*see* Dunoff & Pollack, *supra* note 55).

[59] But even there the scholarship focuses primarily on the office of the Chief Justice of the Supreme Court of the United States (*see* in particular Danelski & Artemus Ward, *supra* note 34; and literature in note 34) and to a large extent neglects the role of lower federal courts and state courts presidents.

[60] *See* in particular Solomon 2012, *supra* note 41, at 918; Müller, *supra* note 17; Kosař, *supra* note 9, at 390; and Anna Wallerman, *Review of David Kosař, Perils of Judicial Self-Government in Transitional Societies*, 55 COMMON MARKET LAW REVIEW 676, 677 (2018). For further literature, *see* Part D.

[61] We revisit this claim in Part D.

judicial councils.[62] This theory argues that those actors who emerged as winners from the first "transition wave" of judicial reforms (between 1989 and 1997), the Ministry of Justice or the judicial council (often composed of or under the influence of court presidents), were better placed in the second "pre-accession wave" (between 1998 and 2006) of judicial reforms and exploited the opportunities provided by the European Union to entrench existing domestic allocations of power.[63] Court presidents play an even more prominent role in Kosař's judicial leadership theory of CEE judicial councils. According to this theory, the introduction of the strong judicial council model of court administration into a bureaucratic CEE judiciary in the medium term empowers judicial leadership, namely court presidents, who then use their newly accrued powers to punish their critics and reward their allies within the judiciary in order to preserve their privileges and influence.[64] Finally, Kosař used the "bargaining in the shadow of the law" metaphor in examining how Czech court presidents, step by step, managed to erode the Minister of Justice's sphere of influence in court administration and have themselves become the most powerful figures within the Czech judiciary.[65]

To summarize this part, we know that court presidents may wield significant power and play various roles, both within their courts and vis-à-vis external actors. We also know that court presidents are particularly strong in some Eastern European countries, where they may, under some circumstances, become the masterminds of their judiciaries. However, we lack thorough understanding of the nature of court presidents' competences. Nor do we know in what ways and to what extent the role of court president actually differs between Western and Eastern Europe, as all studies to date focused only on a very limited set of jurisdictions. In order to answer these questions in the next two Parts we first conceptualize the powers of court presidents and then we compare how important they are as players in 13 European jurisdictions. Finally, in Part D we identify contingent circumstances that may affect the exercise of these powers in practice.

B. Powers of Court Presidents

We have suggested above that court presidents, although often overlooked, may become quite strong and influential actors within their judiciaries. This claim naturally begs the question what the nature of their power is and in what areas it materializes. In order to

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[62] *See* in particular Piana, *supra* note 37, at 43–44.

[63] *See* Daniela Piana, *The Power Knocks at the Courts' Back Door – Two Waves of Postcommunist Judicial Reforms*, 42 COMPARATIVE POLITICAL STUDIES 816 (2009); and Piana, supra note 37, at 162–165. Note that other scholars have shown that Piana's two-wave theory does not work in all CEE countries. *See* Kosař, *supra* note 9, at 10–11 (on Slovakia).

[64] Kosař, *supra* note 9, at 16–19 and 398–405.

[65] *See* Kosař, *supra* note 11 (on Czechia).

answer this question we unpack the power of court presidents into seven smaller components and show how court presidents may exploit them. While we eventually argue that these components are interconnected and that these "subpowers" of court presidents should be viewed holistically, we find this "unpacking exercise" necessary, because it allows us to compare European judiciaries in Part C in a far more nuanced way than without it.

However, we need to add three important caveats here. First, we are not claiming that every court president has all of these powers. Our aim is to conceptualize the potential powers that court presidents may have. Whether a particular court president actually enjoys these powers depends, among other things, on the legal framework in a particular jurisdiction, on the prevailing political and legal culture, and on the tier of the judiciary he sits on. Second, we do not limit our analysis merely to conceptualization of formal powers. Many of the powers discussed below are informal. However, we find them equally important for understanding the scope of power of court presidents in each jurisdiction.[66] Third, we leave aside presidents of administrative courts and special tribunals.

I. Power over Judicial Careers

By far the most important power that court presidents in many countries wield is the power over the career of rank-and-file judges. Their influence over such career may start at the very beginning of it with powers over the selection and appointment of judges that can range from informal influence over the bodies that select judges to direct power, both formal and informal, to pick judges by themselves.[67] The typical examples of an indirect, albeit formal, power can be found at the ECtHR and the CJEU. The President of the ECtHR is consulted on appointments to the Advisory Panel that monitors the election of judges.[68] The President of the CJEU plays an even greater role as he alone proposes members to the Article 255 TFEU panel and also defines its operating rules.[69] Irish court presidents also have significant influence over the selection of judges, as they have a seat on the Judicial

[66] For a comprehensive explanation of why informal powers are important, *see* Dressel, Sanchez–Urribarri & Stroh, *supra* note 44.

[67] Understandably, in some countries, court presidents have little or no influence over selection of judges. For instance, in Romania it is the National Institute of Magistracy, which is coordinated by the Superior Council of Magistracy, that is responsible for recruiting and training new judges. The Superior Council of Magistracy is strongly anti–hierarchical and court presidents have little influence within it. *See* Bianca Selejan-Guțan, *Romania: Perils of a "Perfect Euro-Model" of Judicial Council*, in this issue; and Bogdan Iancu, *Perils of Sloganised Constitutional Concepts, Notably that of 'Judicial Independence'*, 13 EUROPEAN CONST. LAW R. 582, 594 (2017).

[68] Shai Dothan, *The Motivations of Individual Judges and How They Act as a Group*, in this issue.

[69] Krenn, *supra* note 26; and Dothan, *supra* note 68. Note also that according to the Art. 255 TFEU the European Parliament proposes one member, which is than included by the President of the CJEU in the list of Panel members appointed by the Member States.

Appointments Advisory Board that proposes to the Minister of Justice a list of candidates for the office of judge. Even though the Minister does not have to pick from that list, it is a strong social convention.[70]

In other countries, court presidents may even become the principal gatekeepers to the judiciary. For instance, in Czechia[71] it is formally the Minister of Justice who selects judges and the Czech President who appoints them, but in practice court presidents of the regional and apex courts are the ones who de facto handpick the judges to "their" courts.[72] As detailed substantive criteria for the selection of judges are lacking[73] it fell to the court presidents to sift through the potential candidates and pick the ones who may eventually end up at their court, giving them substantial power.[74] This not only allows court presidents to shape the judiciary by favoring the candidates who share their views, but also gives them significant leverage over these newcomers on the bench as the selected candidates may feel that they owe loyalty to the court president who actually picked them.[75] But this phenomenon is not unique to Czechia. Court presidents in Slovenia[76] and Slovakia[77] also de facto guard the entrance to the judiciary, notwithstanding the fact that a judicial council exists in both countries.

But court presidents' power over the careers of rank-and-file judges does not necessarily end with the selection of a new judge. On the contrary, rank-and-file judges may depend on court presidents even more, as the latter may have a significant say in the promotion of judges to higher courts. In fact, this is a common practice in Europe. In France, court

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[70] Patrick O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* in this issue.

[71] Zdeněk Kühn, *Judicial Administration Reforms in Central-Eastern Europe: Lessons to be Learned,* In Seibert-Fohr, *supra* note 17, at 603, 612; and Kosař, *supra* note 11, at 97 and 100.

[72] For further details on the selection of judges, *see* Kosař, *supra* note 9, at 188–191 and 215–216.

[73] The only legal requirements for being appointed a judge are the following general criteria: the Czech nationality, the age of thirty, a clean criminal record, a negative lustration certificate, legal education, and three years of practice.

[74] MoJ has tried to wrestle some of the power back in 2017 by issuing, probably unconstitutional, instructions detailing the criteria and the process of selection and training of the candidates.

[75] This arguably makes these newly selected judges, handpicked by court presidents, more susceptible to eventual pressure by court presidents, which in turn has a potentially negative impact on judicial independence.

[76] Matej Avbelj, *Contextual Analysis of Judicial Governance in Slovenia,* in this issue.

[77] Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia,* in this issue. But note that presidents of regional courts have greater influence than presidents of district courts.

presidents assess judges by themselves;[78] in Slovenia they chair the Personnel Councils that peer-review judges and make recommendations as to their career advancement;[79] and in Slovakia they decide on the composition of the committees that promote judges and on secondments, which significantly increases judge's chances of being promoted.[80] In Germany court presidents chair the Presidential Councils (*Präsidialräte*) that write a statement on the qualities of judges up for promotion.[81] This is something German rank-and-file judges may take into account when deciding cases. More specifically, it has been reported that judges who seek promotion may be tempted to adjust their decision-making according to the views of their court presidents and that maverick judges may be denied promotion.[82] If this may happen in Germany, it is highly likely that similar considerations are taken into account in other jurisdictions too.

To be sure, court presidents are not accidentally given this power over judicial selection and promotion. They are actually the ones who have the best overview of what is going on within their courts, what kind of judge they need to complement their "team", and what the strengths and weaknesses of each rank-and-file judge are. For the very same reason, court presidents are also the ones who may and most often do subject judges to accountability mechanisms[83] such as disciplinary proceedings,[84] case-assignment and reassignment,[85] and periodic judicial performance evaluation.[86] All of these accountability mechanisms may, each in its own way, affect the career of a rank-and-file judge.

II. Administrative Power

Court presidents may affect not only the careers of rank-and-file judges, but also their everyday lives and work. They often have broad managerial powers that can be used quite

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[78] Antoine Vauchez, *The Ever Protracted Rise of Self-Government in France,* In this issue; Antoine Garapon & Harold Epineuse, *Judicial Independence in France*, *in* Seibert-Fohr, *supra* note 17, at 273, 285–286.

[79] Avbelj, *supra* note 76. *See* especially the citation of a resignation letter by the former Judicial Council member, Nevenka Šorli, who claimed that it is the Personnel Councils that make the decision on promotion of a judge.

[80] Spáč, Šipulová & Urbániková, *supra* note 77.

[81] Anja Seibert-Fohr, *Judicial Independence in Germany, in* Seibert-Fohr, *supra* note 17, at 447, 460.

[82] *See* Stephen Ross Levitt, *The Life and Times of a Local Court Judge in Berlin*, 10 GERMAN L.J. 169, 197–8 (2009); and Seibert-Fohr, *supra* note 81, at 502.

[83] For taxonomy of these mechanisms, *see* Kosař, *supra* note 9, at 73–120.

[84] This is the case in Czechia, Slovakia or France; *see* Kosař, *supra* note 9, at 214, 234; Spáč, Šipulová & Urbániková, *supra* note 77; and Garapon & Epineuse, *supra* note 78, at 292.

[85] Spáč, Šipulová & Urbániková, *supra* note 77; Kosař, *supra* note 9, at 212, 232.

[86] This is the case of Romania or Slovenia, *see* Gutan, *supra* note 67; and Avbelj, *supra* note 76.

effectively. Most importantly they may decide what cases, and how many, each judge at their courts will deal with. This can be done either by *deciding in what chamber a judge will sit* or through the *power to assign cases*.

The composition of a panel matters in all jurisdictions.[87] If a court president may reshuffle the panels according to her liking, she may influence the dynamics within the panels and sometimes even change the outcome of a case.[88] However, assigning to a chamber or a panel[89] matters even more when judges are not generalists and the chambers are specialized in some area of law.[90] Typically, courts have separate civil and criminal divisions, but sometimes the specialization of judges goes much further and the special chambers focus on a very narrow area of law, such as bankruptcy law, intellectual property law or competition law. In such scenario, court presidents de facto decide on the specialization of rank-and-file judges at their courts and may even repeatedly force them to adjust to the new area of law, which can be frustrating at times.

Case assignment is an even more straightforward technique. If a court president can assign cases on a discretionary basis[91] or can at least influence the mechanism of distribution of cases, she may achieve the same ends. The comparative analysis shows that random case assignment coupled with the possibility for a rank-and-file judge to challenge the allegedly improper assignment of a particular case exists only in few jurisdictions covered by this special issue.[92] In most countries, court presidents can either assign cases on a discretionary basis, or they determine[93] (or at least heavily influence)[94] the rules (typically in the so-called "work schedule") of case assignment. Moreover, even in countries that established random initial case assignment court presidents may exploit the loopholes

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[87] For a recent example beyond Europe, *see* the controversial actions of the Chief Justice of India in De & Khaitan, *supra* note 46.

[88] *See* also below on the jurisprudential powers of court presidents.

[89] E.g. in Italy, Czechia, Netherlands, *see* Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model,* in this issue; Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?,* in this issue; and Elaine Mak, *Judicial Self-Government in the Netherlands: Demarcating Autonomy,* in this issue.

[90] Kosař, *supra* note 9, at 80.

[91] France, *see* Garapon & Epineuse, *supra* note 78, at 288.

[92] *See* e. g. Germany, *see* Siebert-Fohr, supra note 81, at 486; and Fabian Wittreck, *German Judicial Self-Government: Institutions and constraints of self-government in Germany*, in this issue.

[93] Czechia, Ireland, Italy, France, Netherlands and others, *see* Blisa, Papoušková & Urbániková, *supra* note 89; O'Brien, *supra* note 70; Vauchez, *supra* note 78; and Mak, *supra* note 89.

[94] *Cf*. Slovakia, in which cases are since 2002 assigned randomly by a computer, *see* Spáč, Šipulová & Urbániková, *supra* note 77.

within this system,[95] override the initial case assignment and reassign the case to another judge.[96]

The crucial nature of these two powers is obvious, because by simply assigning a judge to a specific chamber a court president can determine her specialization for the future, and assigning a judge to a chamber dealing with cases outside her specialization can even be used as a powerful tool for punishing a recalcitrant judge.[97] Similarly the power to assign cases, when purely discretionary, can be used as a tool to reward or punish by distributing cases unevenly according to their difficulty, number, political salience and other criteria. However, in those countries where the right to a legal judge (*gesetzlicher Richter*) has constitutional rank,[98] the power of court presidents to tinker with case assignment is substantially reduced or even eliminated.[99]

With the rise of new public management and the growing emphasis on the speediness of justice, court presidents also increasingly set caseload quotas and police their fulfillment.[100] This control often goes beyond the mere checking of the number of cases disposed of and may materialize into a full-fledged regulation of case-flow and judicial performance evaluation. Through these mechanisms court presidents may motivate slower judges, but they may also exercise inappropriate pressure that impinges upon the core judicial values[101] or create a "culture of numbers" that may result in output perversions.[102]

Finally, court presidents also possess other administrative powers that do not have a direct bearing on decision-making, but still have a significant impact on the day-to-day work of judges.[103] First of all, they process complaints against judges.[104] Second, they hire and

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[95] Similar mechanism exists in Romania, but is not allegedly completely resistant to rigging, *see* Coman & Dallara, *supra* note 36, at 862.

[96] On Harabin in Slovakia, *see* Kosař, *supra* note 9, at 320–321, 327–329. *See* also recent Indian controversy in India in De & Khaitan, *supra* note 87.

[97] Kosař, *supra* note 9, at 81; and Popova, *supra* note 41, at 136–138.

[98] E. g. in Germany or Czechia. *See* Seibert-Fohr, *supra* note 81, at 481–483; or David Kosař, *Rozvrh práce: Klíčový nástroj pro boj s korupcí soudců a nezbytný předpoklad nezávislosti řadových soudců*, 154 PRÁVNÍK 1049 (2015).

[99] This goes especially for the countries with electronic randomized distribution of cases, *see supra* notes 94 and 95.

[100] E. g. Mak, *supra* note 89.

[101] Tomer Zarchin, Nir Haason & Yaniv Kubovich, *Jerusalem Judge Commits a Suicide Due to Workload,* HAARETZ (February 9, 2011), https://www.haaretz.com/1.5119677.

[102] Kosař, *supra* note 9, at 70–71.

[103] Netherlands, Czechia, Slovenia and others, *see* Mak, *supra* note 89; Blisa, Papoušková & Urbániková, *supra* note 89; and Avbelj, *supra* note 76.

dismiss administrative staff at their court (or even courts),[105] ranging from secretaries to law clerks.[106] Furthermore, court presidents control or influence the administration of material resources at their courts[107] and exercise further executive functions.[108] They also approve judges' travel to conferences and their extrajudicial activities. Simply abusing one of these powers can rarely create more than a nuisance (e.g. giving a judge a small office) and is not capable of a heavy impact by itself but, when cleverly combined, they may have the effect of "death by a thousand cuts" – a judge with a small office, a slow computer with a slow Internet connection, relying on ineffective administrative staff and an incompetent law clerk, overburdened due to unfavorable case assignment mechanisms, may either fold and give in to the pressure of the court president, resign or make a mistake and be potentially exposed to disciplinary proceedings.[109]

III. Jurisprudential Power

Court presidents also wield jurisprudential power. If they are leading figures in their field and possess a healthy dose of leadership skills and judicial statesmanship, they may set the courts' agenda and even shape the law. At lower courts, court presidents may influence their younger colleagues, especially at the bureaucratic civil law judiciaries where judicial candidates become judges only a few years after law school and are completely socialized within the judiciary. At apex courts, the court presidents often have additional institutional advantages, such as opinion assignment, deciding on the vote order, third-party interventions[110] and additional resources,[111] which they may utilize to set the agenda and promote their preferences. Chief Justices also often automatically sit on the grand chamber[112] (or similar extended bodies that unify the case law and decide the most vexing

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[104] E.g. in Czechia or Slovakia, *see* Kosař, *supra* note 9, at 221–222, 229, 275, 285.

[105] This goes for the Chief Justice of the Supreme Court of the United States, *see* Pfander, *supra* note 45, at 1132–1137.

[106] This is the case of the ECtHR, on legal staff, *see* Dothan, *supra* note 68; or Germany, *see* Seibert-Fohr, *supra* note 81, at 456–457.

[107] Vicki C. Jackson, *Judicial Independence: Structure, Context, Attitude*, *in* Seibert-Fohr, *supra* note 17, at 19, 53-54; Kosař, *supra* note 9, at 90-91; Popova, *supra* note 41, at 59; Schwartz & Sykiainen, *supra* note 36, at 976.

[108] *See* Pfander, *supra* note 45, and Chutkow, *supra* note 45, at 303–304.

[109] This happened to a certain degree in Slovakia, *see* Kosař, *supra* note 9, at 361.

[110] Çalı & Cunningham, *supra* note 29.

[111] The extra resources may include, among other things, more law clerks, more secretarial support, and special research divisions; *see* Kosař, *supra* note 9, at 403.

[112] This is the case of virtually all courts where such a body exists.

issues) and may even decide on the grand chamber's composition.[113] All of this gives them additional leverage and distinguishes them from senior judges, who may also have jurisprudential power, but they have to rely solely on their erudition and reputation.

Court presidents may also foster consensual decision-making by skillful framing of cases and alleviating tensions among their colleagues. Vice versa, if they fail to forge consensus, the level of conflict at a given court may skyrocket. This may in turn result in the rise of dissenting and concurring opinions.[114] This arguably happened at the U.S. Supreme Court after Harlan Fisk Stone was elevated to the position of the Chief Justice (1941–1946).[115] Studies on changing dissent rates in the Supreme Court of Canada,[116] the High Court of Australia,[117] and the Supreme Court of Norway[118] also found that court leadership is important in explaining variation of dissent over time. Even if separate opinions are not allowed, which is the case for most continental ordinary courts, lackluster leadership has significant jurisprudential effects, albeit less visible than the separate opinions. Failing leadership at lower courts may cause the increase of divergent opinions across courts' various panels, which in turn may increase the burden of the appellate courts, while at apex courts it may require triggering burdensome special procedures to unify such divergent case law.[119]

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[113] Czechia, Netherlands (court presidents influence composition of all chambers via Management Board presided by them); *see* Kosař, *supra* note 11, at 100; Mak, *supra* note 89.

[114] Frank N. Cross & Stefanie Lindquist, *Doctrinal and Strategic Influences of the Chief Justice: The Decisional Significance of the Chief Justice*, 154 UNIVESITY OF PENNSYLVANIA L. R. 1665 (2006); cited from Henrik Litleré Bentsen, *Court Leadership, Agenda Transformation, and Judicial Dissent*, 6 JOURNAL OF LAW AND COURTS 189, 192 (2018).

[115] David J. Danielski, *Causes and Consequences of Conflict and Its Resolution in the Supreme Court*, In JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS (Sheldon Goldman & Charles M. Lamb eds., 1986), at 21; and Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court,* 50 JOURNAL OF POLITICS 361 (1988); both cited according to Bentsen, *supra* note 114, at 191–192.

[116] C. L. Ostberg, Matthew E. Wetstein & Craig R. Ducat, *Leaders, Followers, and Outsiders: Task and Social Leadership on the Canadian Supreme Court in the Early 'Nineties*, 36 POLITY 505 (2004); and Donald R. Songer, John Szmer & Susan W. Johnson, *Explaining Dissent on the Supreme Court of Canada*, 44 CANADIAN JOURNAL OF POLITICAL SCIENCE 389 (2011); both cited according to Bentsen, *supra* note 114, at 192.

[117] Russel Smyth, *Explaining Historical Dissent Rates in the High Court of Australia*, 41 COMMONWEALTH AND COMPARATIVE POLITICS 83 (2003); and Russel Smyth & Naryan Kumar Paresh, *Hail to the Chief! Leadership and Structural Change in the Level of Consensus on the High Court of Australia*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 399 (2004); both cited according to Bentsen, *supra* note 114, at 192.

[118] Bentsen, *supra* note 114, at 194–210.

[119] Such as referral of the case to the Grand Chamber at the ECtHR, *see* Çalı & Cunningham, *supra* note 29; CJEU's President similarly wields substantive power regarding case assignment, *see* Krenn, *supra* note 26.

Sometimes court presidents may shape the jurisprudential image even by subtle changes to the rules of the debate among judges. For instance, a court president may deliberately change the internal institutional dynamics of her court by facilitating a more "academic" style of deliberation in which conference discussions are expanded.[120] As a result, opinion writing and circulation delays become more common and the judges may seize the opportunity to reargue contentious cases.

However, there is also a dark side of the court presidents' jurisprudential power. Instead of shaping the law and persuading their colleagues to steer the courts according to their jurisprudential vision, court presidents can misuse their powers and either silence the critics or even attempt to influence the outcome of individual cases. For instance, in the absence of separate opinions, by assigning a liberal judge to a three-judge panel where she will be regularly overruled by her conservative colleagues a court president can effectively silence certain jurisprudential positions at the court. Similarly, by assigning a case to a judge who a court president knows will decide it in a certain way, be it out of that judge's political views[121] or sheer loyalty to the court president, the court president may bend the case law in the direction she wants. To name one more example, the Chief Justice of the Slovak Supreme Court "contained" his critics in two chambers of the administrative law division which dealt only with disputes with limited policy implications, and hence his critics could not influence the case law of the Supreme Court in important areas of law.[122] In the worst case scenario, a court president may become a "transmission belt"[123] of powerful political and business actors and rig the court according to their will.[124]

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[120] This is what the Chief Justice of the U.S. Supreme Court Harlan Fisk Stone did in the 1940's, *see* PAMELA C. CORLEY, AMY STEIGERWALT & ARTEMUS WARD, THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT (2013), cited according to Bentsen, *supra* note 114, at 192. Fifty years later, Carsten Smith did the same once he became the Chief Justice of the Supreme Court of Norway, *see* Bentsen, *supra* note 114, at 196–198.

[121] Wood, Lanier, Keith & Ogundele, *supra* note 34, at 800 and 805–808, find that this so-called attitudinal model of case assignment is not supported by data at the Supreme Court of the United States; but *see* also Maltzman & Wahlbeck 1996, at 421–425; Maltzman &Wahlbeck 2004; Maltzman; White; and Lax & Cameron, all *supra* note 34, who found that organizational needs are a strong factor in case assignment, but the attitudinal (i.e. ideological proximity) factor also played some role.

[122] Kosař, *supra* note 9, at 320–321.

[123] The "transmission belt" metaphor suggests that court presidents, who could be recalled by the ruling party/individual anytime at a whim, become the conduit of the ruling party/individual influence over individual judges. The main role of the court presidents is then to "transmit" orders from the ruling party/individual to individual judges in sensitive cases. *See* e.g. Kosař, *supra* note 11, at 101, 105, 117, and 121–122; and Rachel Ellett, Raul Sanchez Urribarri & Alexei Trochev, *Chief Justice as a Political Agent: Evidence from Zambia, Venezuela, and Ukraine*, paper presented at the ECPR General Conference in Prague on 9 September 2016 (on file with author).

[124] Popova, *supra* note 41, at 163; and Alexei Trochev, *Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine*, 18 DEMOKRATIZATSIYA 122, 133 (2010).

IV. Financial Power

Resources are crucial for courts and judges alike, and equally crucial is the power to distribute them. Courts need to finance their day-to-day functioning, and it is often in the hands of court presidents to manage the courts' budgets.[125] Furthermore, although it would be surprising to find a country where court presidents have complete power over judicial salaries, they often have at least some say in distributing salary supplements, bonuses or other non-monetary perks.[126]

For example, in Russia and Ukraine court presidents decide on various ancillary issues such as the allocation of subsidized housing and deciding on judges' vacation packages. As judges in these two countries are often entitled to subsidized housing, and, since the available housing is not unlimited and not all housing is equal, this perk is often used by court presidents to please or intimidate judges.[127] "Disloyal" judges thus can be denied an apartment for several years or "can suddenly face eviction or transfer to another apartment, which in the best-case scenario is a huge hassle".[128] In fact, Russian and Ukrainian court presidents have even wider powers and may help judges with other perks that affect their well-being, such as judges' vacation packages and access to day care for their children.[129]

The European countries covered by this special issue leave generally less room for court presidents to affect the extrajudicial lives of rank-and-file judges, but in some post-communist countries, such as Slovakia, court presidents have managed and used these non-monetary benefits to reward and punish judges.[130]

V. Ambassadorial Power

Another important activity of court presidents is interaction with the outside world, be it the public or the other branches of power, which they can use to lobby for their interests or for the interests of their courts, the judicial branch or even their country. This "ambassadorial" power may stem both from their legally prescribed duties and from the

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[125] This is the case of Czechia, or, to some degree, of Netherlands, where court presidents implement court's budget through the Management Boards; *see* Blisa, Papoušková & Urbániková, *supra* note 89, and Mak, *supra* note 89.

[126] E.g. Slovakia, *see* Spáč, Šipulová & Urbániková, *supra supra* note 77.

[127] *See* Popova, *supra* note 41, at 134.

[128] *Id.*

[129] *See* Solomon 2010, above note 41, at 354; or Solomon 2012, *supra* note 41, at 912.

[130] *See* Kosař, *supra* note 9, at 361 and 369.

convention. This power is particularly elastic and depends heavily on the personality and political savviness of the court president as well as on the respective political and legal culture.

For instance, the Presidents of both the CJEU[131] and the ECtHR[132] can serve as examples of this power, as both of them are supposed to represent their courts, and indeed use this role extensively. Similarly, virtually all major judicial figures in Australia, Canada, New Zealand and the United Kingdom engage in international diplomacy and regularly give speeches primarily (but not exclusively) in other Commonwealth countries.[133] So does the Chief Justice of the Supreme Court of the United States who also publishes an annual year-end report on the state of the federal judiciary in which he can raise various issues to be tackled by the judiciary and other branches.[134] Italy serves as yet another example. Here the first president of the *Corte Cassazione* makes a speech on the occasion of the opening of the judicial year in the presence of, among other dignitaries, the President of the Italian Republic and other key public officials. This is not just a ceremonial meeting as, after the speech, the two go into a deep discussion on the issues related to the functioning of the justice system.[135]

However, ambassadorial power may sometimes put court presidents on a collision course with political branches. This was the case of the Hungarian Supreme Court President András Baka who was ex lege also the chairman of the National Judicial Council. As the President of the National Council of Justice, he was under an explicit statutory obligation to express an opinion on draft legislation that affected the judiciary.[136] Once Viktor Orbán presented his controversial judicial reforms, András Baka became a vocal critic of these reforms and repeatedly addressed the Parliament and other bodies where he contended that the new laws negatively affected the judiciary. Orbán's regime apparently did not like

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[131] *See* Krenn, *supra* note 26, and his description of the role of the then Court President Skouris in the institutional reform of the General Court. Moreover, the CJEU's Court President has the power to further shape the image of the Court in that external activities of judges are subject to prior approval by their peers, and the Court President has quite a significant say in this.

[132] Çalı & Cunningham, *supra* note 29, describe the role of the then ECtHR's President Jean-Paul Costa in the introduction of the Advisory Panel and the suggested influence over its composition.

[133] *See* e. g. P. Y. Lo, *Chief Justice McLachlin and Hong Kong*, I-CONNECT (October 1, 2017), http://www.iconnectblog.com/2017/12/lo-on-chief-justice-mclachlin/; for speeches of the Justices of the High Court of Australia *see* http://hcourt.gov.au/publications/speeches/speeches-by-current-justices; for speeches by the judges from New Zealand *see* https://courtsofnz.govt.nz/publications/speeches-and-papers; and others.

[134] *See* Chief Justice's Year-End Reports on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

[135] Benvenuti & Paris, *supra* note 89.

[136] Baka v. Hungary, *supra* note 48, para 44.

it and eventually passed a constitutional amendment that de facto dismissed András Baka from both functions and allowed Orbán to replace Baka with more loyal persons.[137] A similar scenario has taken place in Poland, where the Law and Justice Party wants to get rid of the Polish Supreme Court President, Małgorzata Gersdorf,[138] who stood up against the attempts to curb the Supreme Court.[139]

However, such firm stance against controversial judicial reforms may also increase the ambassadorial power of court presidents abroad as they become a moral symbol of defiance against the populist political leaders and their abusive techniques. It did not eventually help András Baka, but the recent actions of the EU organs regarding the Polish judicial reforms suggest that Małgorzata Gersdorf has used her ambassadorial power well.[140]

VI. Media Power

Court presidents use a plethora of tools to communicate with various audiences, including press releases, social media, special events, and YouTube.[141] They also enjoy unprecedented access to the media as they are perceived as speaking on behalf of the judiciary. By engaging with the journalistic press court presidents can even shape the public image of the judiciary. For instance, the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, regularly talks to the press, initiated a now-traditional question and answer with television media following her annual address at the Canadian Bar Association, and hosts an annual open-door celebration at the Supreme Court on Canada Day.[142] She also learned how important media power is when she was forced to

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[137] For further details, *see* Kosař & Šipulová2018, *supra* note 1.

[138] *See* note 5 above.

[139] *See* note 5 above.

[140] *See* Case C-216/18 PPU Minister for Justice and Equality v LM; and the "The CJEU's Deficiency Judgment" symposium at the Verfassungsblog (https://verfassungsblog.de/category/focus/after-celmer-focus/). *See* also the other two pending cases initiated by the European Commission before the CJEU (Case C-192/18, Commission v. Poland, pending; and Case C-619/18, Commission v. Poland, pending). In December 2017, the European Commission also launched the so-called Article 7 proceedings against Poland over changes to the judicial system.

[141] *See*. e. g. JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO (2010); SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS (2015); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2005); Lawrence Baum, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); Olga Frishman, *Court-Audience Relationships in the 21st Century*, MISSISSIPPI LAW JOURNAL (forthcoming); NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY (2017); the CCJE also lists "*maintaining and developing relations with other bodies and institutions*" as one of the key roles of the court president, *see supra* note 49.

[142] Lawrence David, *The Face of and Institution: Beverly McLachlin's Reinvention of the Role of the Chief Justice of Canada,* I-CONNECT (December 8, 2017), http://www.iconnectblog.com/2017/12/david-on-chief-justice-mclachlin/.

defend herself against allegations by the then Prime Minister of Canada, Stephen J. Harper, of having improperly interfered with the nomination of Marc J. Nadon,[143] a Federal Court of Appeal judge who was later disqualified from appointment on the basis of his ineligibility for one of three Supreme Court seats reserved for the province of Quebec.[144] The witty use of media power is no less important in emerging democracies.[145]

In Europe, court presidents are also vocal in the media. Presidents of supranational courts have been particularly active in this regard. Koen Lenaerts, the president of the CJEU, regularly provides interviews and engages with the press.[146] Most ECtHR presidents do so too. Luzius Wildhaber and Jean-Paul Costa were particularly outspoken in press conferences and interviews.[147] Domestic court presidents have not been left behind. They often employ press officers to handle the media for day-to-day information about the outcomes of cases,[148] but they make sure that these press releases are coherent with their vision of their court. However, the media power of court presidents often goes further. For instance, the Czech apex court presidents receive substantial media attention that they use to gather political support as well as a tool in the interaction with political actors.[149] Sometimes court presidents use the media to expose disagreement among themselves[150]

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[143] Sean Fine, *The secret short list that provoked the rift between Chief Justice and PMO*, THE GLOBE AND MAIL (May 23, 2014), https://www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823392/.

[144] *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 S.C.R. 433, 2014 SCC 21. For further details, *see* Carissima Mathen. *The Shadow of Absurdity and the Challenge of Easy Cases: Looking Back on the Supreme Court Act Reference*, 71 SUPREME COURT LAW REVIEW 161 (2015).

[145] *See* e.g. Stefanus Hendrianto, *The Puzzle of Judicial Communication in Indonesia: The Media, the Court, and the Chief Justice,* In JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE 141 (Richard Davis & David Taras eds., 2017).

[146] *See* e.g. Duncan Robinson & Alex Barker, *EU's top judge defends ECJ against charges of integration agenda*, FINANCIAL TIMES (November 22, 2016), https://www.ft.com/content/0e132ef8-af0c-11e6-a37c-f4a01f1b0fa1.

[147] WOJCIECH SADURSKI, CONSTITUTIONALISM AND THE ENLARGEMENT OF EUROPE (2012), at 1. For Wildhaber's vision of the Strasbourg Court, *see* Luzius Wildhaber, *The European Court of Human Rights: The Past, The Present, The Future*. 22 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 521 (2007).

[148] E. g. Germany, *see* Seibert-Fohr, *supra* note 81, at 506.

[149] The Supreme Administrative Court's President, Josef Baxa, is a regular guest of radio show called *How He Sees It*, and the Constitutional Court's Chief Justice Pavel Rychetský frequently gives interviews on topics ranging from the judicial to the purely political ones; *see* e. g. Martin Biben & Markéta Šrajbrová, *Prezident nemůže protahovat vládnutí kabinetu bez důvěry neomezeně*, HOSPODÁŘSKÉ NOVINY (November 1, 2017), https://archiv.ihned.cz/c1-65935270-prezident-nemuze-protahovat-vladnuti-kabinetu-bez-duvery-neomezene-hrozi-mu-ustavni-zaloba-tvrdi-rychetsky; or Kristýna Novotná, *Mám obavy ze Zemanovy kohorty panošů, Ovčáčka by měli na hodinu vyhodit, říká šéf Ústavního soudu Rychetský*, IROZHLAS (January 8, 2018), https://www.irozhlas.cz/zpravy-domov/pavel-rychetskymilos-zemanjiri-ovcacek_1801080600_ogo. Note that in the polls assessing the popularity of public officials, Rychetský often comes out on top of the ladder.

[150] Franck Johannès, *Le premier président de la Cour de cassation s'inquiète du pouvoir croissant du Conseil d'Etat*, LE MONDE (December 21, 2015), https://www.lemonde.fr/police-justice/article/2015/12/21/le-premier-president-

and even to criticize each other. The rapid development of social media such as Facebook or Twitter also provided court presidents with an opportunity to further boost their media power, because they can use the new platforms to communicate directly with their intended audiences and set their agenda without the need to rely on traditional media to "get it right".[151]

VII. Ancillary Powers

In some countries court presidents also have various ancillary powers that do not directly concern judicial decision-making or the functioning of their courts *stricto sensu* and cannot be put into some of the categories mentioned above. This does not mean, however, that these powers are negligible. For instance, the Chief Justice of the Supreme Court of Canada, beyond her additional roles, also chairs the committee which advises the Governor General on awards of membership of the Order of Canada[152] as well as the Board of Governors of the National Judicial Institute, which develops and delivers various educational programs for all Canada's federal, provincial and territorial judges.[153] Furthermore, the Chief Justice of the Supreme Court of Canada appoints a substitute Chief Electoral Officer in case of her negligence or death or incapacity while Parliament is not sitting.[154] What is more, should the Governor General die, become incapacitated, be removed or be absent from the country for a period of more than one month, the Chief Justice would become the Administrator of Canada and exercise all the powers and authorities of the Governor General.[155]

Importantly, court presidents often sit on or even chair JSG bodies. In the Netherlands, court presidents chair the management boards established at each court.[156] Similarly, Slovenian court presidents preside over personnel councils.[157] In Ireland, the Judicial

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de-la-cour-de-cassation-s-inquiete-du-pouvoir-croissant-du-conseil-d-etat_4835887_1653578.html. For further background of this rare public disagreement between the First President of the French *Cour de Cassation* Bertrand Louvel and the Vice-President of *Conseil d'État* over the dualism of the French judiciary, *see* Marie-Christine de Montecler, *Duel à distance sur le dualisme juridictionnel*, DALLOZ ACTUALITE (July 28, 2017), https://www.dalloz-actualite.fr/flash/duel-distance-sur-dualisme-juridictionnel#.W-vVLeKNzjw.

[151] *See* e. g. the Twitter account of the Czech SAC's President Josef Baxa, at https://twitter.com/josefbaxa2.

[152] David, *supra* note 142.

[153] *Id.*

[154] *Canada Elections Act*, S.C. 2000, c.9, s. 14(1).

[155] *About the Judges*, SUPREME COURT OF CANADA (August 28, 2017), http://www.scc-csc.ca/judges-juges/about-apropos-eng.aspx.

[156] Mak, *supra* note 89.

[157] Avbelj, *supra* note 76.

Appointments Advisory Board (JAAB) is chaired by the Chief Justice and the president of each court is a member *ex officio*, which gives court presidents a significant influence in the JAAB.[158] In Germany, court presidents sit on presidia, councils of judicial appointment and in some *Länder* even on committees for the selection of judges.[159] The President of the Supreme Court presides over the judicial councils in Spain[160] and France.[161]

In contrast, the CEE countries initially allowed court presidents to sit on judicial councils, but then they retreated due to problems with the accumulation of too much power. For instance, Poland banned court presidents from membership of the National Council of the Judiciary in 2007.[162] The Slovak Parliament adopted the same incompatibility rule in 2011, and later on even stripped the Supreme Court President of chairmanship of the judicial council.[163] Until 2014 the Chief Justice of the Slovak Supreme Court also chaired the Judicial Council of the Slovak Republic. Only in the wake of the authoritative rule of the Supreme Court President, Štefan Harabin, who used the carrots to reward his allies within the judiciary and ruthlessly employed the available sticks against his critics, Slovakia split these two positions among two different persons.[164] To make things even more complex, the separation of the positions of the chairman of the judicial council and the Chief Justice of the Supreme Court can also be abused, as the *Baka* case attests. As mentioned above, the regime of Viktor Orbán used the need to separate these two offices as a lame justification to dismiss András Baka from both of these functions.[165]

VIII. The Holistic View of Court Presidents' Powers

Even though we unpacked the power of court presidents into seven smaller components for the sake of deeper analysis, they should not be understood as isolated from each other. On the contrary, they are interconnected and have a synergic effect. For instance, if court presidents enjoy great powers regarding the careers of rank-and-file judges, this will also likely enhance their jurisprudential power. Similarly, strong administrative and financial

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[158] O'Brien, *supra* note 70.

[159] Wittreck, *supra* note 92.

[160] *See* Aida Torres Pérez, *Judicial self-government and judicial independence: the political capture of the General Council of the Judiciary in Spain*, in this issue.

[161] Vauchez, *supra* note 78.

[162] *See* Adam Bodnar & Lukasz Bojarski, *Judicial Independence in Poland*, In Seibert-Fohr, *supra* note 17, at 673.

[163] This was the case in Slovakia during the era of the Chief Justice Štefan Harabin (2009–2014). *See* Spáč, Šipulová & Urbániková, *supra* note 77; and Kosař, *supra* note 9.

[164] *See supra* notes 1 and 136–137.

[165] *See* Spáč, Šipulová & Urbániková, *supra* note 77.

powers may also increase court presidents' leverage over rank-and-file judges.[166] A broader jurisprudential power may then buttress the court president's media power. In another scenario, strong media power gives court presidents significant leverage over the bodies formally vested with the power to select and promote judges that in turn may be forced to respect court presidents' views regarding the selection of candidates for judicial office and their subsequent promotion.[167] As a result, selected candidates, handpicked by court presidents, may feel that they "owe" something to their court presidents for being shortlisted and appointed. This may create a certain bond of loyalty[168] which court presidents can later on exploit in order to bolster their jurisprudential and administrative powers.

These relationships between the various powers of court presidents are complex and we do not intend to make any causal claims here as this would require a more in-depth study of selected jurisdictions. Such study would also need to analyze the contingent circumstances[169] of court presidents' powers in each jurisdiction and explore alternative explanations. We merely point out that these relationships exist and should be addressed in future research.[170]

C. How Strong are Court Presidents in Europe?

In Part B of this article, we developed a taxonomy of powers of court presidents. In doing so we built on the contributions in this special issue as well as on examples from all over the globe. In this Part we narrow the number of studied jurisdictions to thirteen and develop a "Court Presidents Power Index". These jurisdictions include 12 jurisdictions covered by this special issue (CJEU, Czechia, ECtHR, France, Germany, Ireland, Italy, the Netherlands, Poland, Romania, Slovakia, and Slovenia) and Russia.[171] By developing the "Court Presidents Power Index" we get an approximate picture of the strength of the court presidents in the studied jurisdictions. Moreover, our index allows us to identify several five types of court presidents (court president as a boss, court president as a judicial leader, court president as a manager, court president as a judicial diplomat, and court president as a *primus inter pares*) and revisit the claim that Western and Eastern Europe view the roles of court presidents differently.

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[166] This was the case in Slovakia during the era of the Chief Justice Štefan Harabin (2009–2014). *See* Spáč, Šipulová & Urbániková, *supra* note 77; and Kosař, *supra* note 9.

[167] This has been the case in Czechia since the late 1990s. *See* Kosař, *supra* note 11.

[168] Note that court presidents may build such loyalty by other means as well – for instance, by a selective use of administrative power or by not initiating the disciplinary motion against a judge who deserves it.

[169] *See* Part D.

[170] For potential avenues for future research *see* Part E.

[171] For explanation, why we omitted Spain and Turkey and why we added Russia, *see* below.

I. Towards the "Court Presidents Power Index"

In order to tentatively compare the strength of court presidents, we created a simple ordinal index of powers of court presidents ("Court Presidents Power Index"). We included every jurisdiction covered by this special issue about which we have a reasonable amount of information regarding the powers of court presidents, either from the contributions to this special issue or from additional sources.[172] We also added Russia to the mix, because Russian court presidents wield more power than in any European jurisdiction covered by this special issue.[173] This should allow us to see the strength of European court presidents in a better perspective.

As to the creation of the index itself, we take six out of seven[174] powers of court presidents discussed in Part B[175] and then we rate court presidents in each jurisdiction depending on the extent of their competences in each of these six areas. We use a three-level scale (extensive, intermediate and minimal power). Therefore for each power we rate whether the power wielded by the court presidents in each area is extensive, intermediate or minimal.[176] If the power is extensive, a country is given 3 points, if the powers is intermediate, a country is given 2 points, and if the power is minimal, a country is allocated 1 point.

The decisive criterion for the rating is the consequentiality of the power given to the court president. Therefore, with regard to the power over judicial careers, court presidents who play a significant role in selecting, promoting and disciplining judges have extensive powers. Those court presidents who have the power to evaluate judges that can have repercussions for their potential career advancement or decide on the composition of another body that plays a key role in selecting judges have intermediate powers. In contrast, court presidents who can influence selection and promotion only indirectly, either through having a say in one of the many bodies involved in the selection of judges or through indirect influence over the promotion of judges, have minimal power. Similarly,

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[172] That is why we omit Spain and Turkey, because we simply do not have sufficient, relevant and accessible information on Spanish and Turkish court presidents.

[173] *See* also Solomon 2012, *supra* note 41; Solomon, *supra* note 41, at 354; Schwartz & Sykiainen, *supra* note 36, in particular at 995–996, 1003, 1008–1009, 1012, 1018–1027 and 1031–1034; Popova, *supra* note 17.

[174] For pragmatic purposes, we leave aside the ancillary powers of court presidents as we do not have sufficient information about them and they are often incommensurable.

[175] We include both formal and informal powers of court presidents, as in many cases the informal powers are interlinked with the formal ones and may be even more consequential.

[176] This categorization is inspired by the table in Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 122 (2009).

extensive administrative power involves a direct influence on case assignment and panel composition, while the power to create work schedules would give court presidents intermediate power and the supervision of automatic case assignment counts as a minimal one. By repeating this exercise for each of the six powers of court presidents we get an approximate picture of their strength in the studied jurisdictions. The result of this rating can be seen in Table 1 below.

Table 1: Court Presidents Power Index: Typology of Powers

Powers / Area	Extensive	Intermediate	Minimal
Judicial Careers	CZ, RU, SLO, SVK (significant role in selection, promotion, or disciplining of judges)	IRE, FR, RO, PL (limited role in selection or promotion of judges)	CJEU, ECtHR (both weak influence over one of the bodies involved in election of judges), GER (indirect influence over promotion of judges), NL, IT
Administrative	FR (discretionary case assignment), CJEU (discretionary case assignment), CZ, IT (panel assignment + work schedules), RU, PL, SLO	SVK, IRE (work schedules, managing courts including staff), NL (case assignment), ECtHR	GER (shared administrative powers), RO (supervising random case assignment),
Financial	RU (powers over bonuses, kindergartens and flats)	SLO (deciding on education, conferences), SVK, FR (power over salary bonuses)	CZ, IT, NL, GER, PL, IRE, RO, CJEU, ECtHR (power over court budgets)
Jurisprudential	CZ, SVK, PL, RU, CJEU (opinion assignment + additional resources)	ECtHR	SLO, GER, IRE, FR, IT, RO, NL
Ambassadorial	ECtHR, CJEU, RU (represent judiciary, communicate with the executive/other organs)	PL, CZ, IRE, SLO, GER	IT (opening of the judicial year), NL (speeches), FR, RO, SVK

Media	CJEU, ECtHR, CZ, SLO	RU	SVK, GER, PL, IRE, NL, FR, IT, RO
Ancillary	Not studied	Not studied	Not studied

After rating each of the court presidents' powers in the respective jurisdictions, we added them up and created a ranking of the jurisdictions according to their court presidents' strengths.

Table 2: Court Presidents Power Index: Overall Strength of Court Presidents

Country	Power Index
Russia	**17**
Czechia	**15**
Slovenia	**14**
CJEU	**14**
Poland Slovakia ECtHR	**12**
France	**10**
Ireland	**9**
Italy	**8**
Romania Germany Netherlands	**7**

We are aware of the fact that our Court Presidents Power Index is still tentative and should be approached with caution. This is so not only due to the scarce literature on court presidents and lack of empirical data, but also because the volatile nature of their powers changes over time.[177] Not only do the powers change over time, but they also greatly

[177] *See* e.g. the recent developments in Poland and Hungary. However, court presidents' powers have been subject to changes also in Czechia, Ireland, Slovakia, as well at the CJEU and the ECtHR.

depend upon the respective court presidents' ability and willingness to use them.[178] Therefore, our index should be viewed rather as a starting point for identifying broader trends and discovering various configurations of court presidents' powers that exist over Europe.

Despite the abovementioned limitations, Tables 1 and 2 reveal some interesting insights. Court presidents with the most extensive powers operate in Russia (17 points), followed by Czechia, Slovenia, and at the CJEU (14 to 15 points). At the other end of the continuum lie the Netherlands, Romania, Germany, Italy and Ireland (7 to 9 points). In the middle of the Table 2 we can find France, the ECtHR, Poland, and Slovakia (10 to 12 points). Russia lives up to the strongman archetype and Russian court presidents wield extensive powers in each area. However, the rest of Table 2 defies straightforward interpretation. Most importantly, we cannot simply conclude that Eastern court presidents are always stronger than their Western European counterparts,[179] because the CJEU President is one of the most powerful and post-communist countries are actually represented not only at the top of Table 2, but also in the middle and even at the bottom of the ranking.

As mentioned above, the Court President Power Index allows us to analyze various configurations of court presidents' powers and identify types of court presidents in Europe. Two types of court presidents emerge clearly from our Index – a court president as *primus inter pares* and a court president as a boss. In the first type, the "first among equals", a court president has limited influence over the careers and financial well-being of individual judges, has limited influence on case assignment and usually shares her administrative powers with other bodies, and instead relies primarily on her leadership skills. Such court presidents also tend to be less visible in the media and do not play the major ambassadorial role. This type of court presidency has often been associated with the common law world.[180]

From our thirteen jurisdictions, Germany comes arguably closest to the *primus inter pares* type.[181] Post-war German jurists have placed a strong emphasis on the independence of individual judges and set the strict limits on how court presidents may interact with rank and file judges. Cases are assigned strictly on random basis according to the criteria set in advance.[182] Even the general rules on the case assignment are not stipulated by court

[178] We address this issue in Part D below.

[179] We address this issue in Part D below.

[180] Solomon, *supra* note 41; Lawrence David, *The Face of an Institution: Beverley McLachlin's Reinvention of the Role of the Chief Justice of Canada,* I-CONNECT, (December 7, 2017) http://www.iconnectblog.com/2017/12/david-on-chief-justice-mclachlin/.

[181] For a similar opinion, *see* also Solomon, *supra* note 41, at 918.

[182] *See* Seibert-Fohr, *supra* note 81, at 481–483.

presidents, but by the Judicial Board (*Präsidium*) of each court. Though the court president is a member of this board, regular judges have a majority there.[183] Moreover, regular judges can challenge the assignment of a particular case before administrative courts if they believe that the rules of case assignment were breached.[184] The Judicial Service Courts have also forbidden court presidents from making any remarks that might influence the future performance of judges, even on matters on case management and efficiency.[185] Similarly, any evaluation of judges must deal only with the outer order of judicial business, and not its core, or how the law is applied.[186] The only area are where court presidents have arguably retained their informal powers is promotion as several commentators suggest that German judges who seek promotion may be tempted to adjust their decision-making according to the views of their court presidents.[187]

Similarly, the powers of Dutch court presidents have been diluted over time. They no longer act alone, but chair the three-member Management Board, which decides on the division of the court into chambers, the allocation of cases, and the day-to-day management, organization and operations of the court.[188] Dutch court presidents thus have rather limited influence over the lives and careers of individual judges.

Interestingly, Romanian court presidents also seem to be rather weak.[189] They serve a relatively short three-year mandate (once renewable), have no influence on case assignment as they merely supervise the system of random case assignment, and have mainly court administration competencies.[190] They have limited influence over the career of rank and file judges, as their only real power is having a say in periodical evaluation of judges which may affect promotion prospects of individual judges. Moreover, their powers are curtailed by the existence of a Ruling Board, which has most decision-making

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[183] *See* Art. 21a *Gerichtsverfassungsgesetz* (German Constitutional Law on Courts).

[184] *See* Judgment of the German Federal Administrative Court of 28 November 1975 (BVerGE 50, 11 = NJW 1976, 1224).

[185] Johannes Riedel, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany*, In, RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE (Giuseppe Di Federico ed., IRSIG-CNR 2005) 69–126, at 98–107.

[186] Anja Seibert-Fohr, *Constitutional Guarantees of Judicial Independence in Germany, in* RECENT TRENDS IN GERMAN AND EUROPEAN CONSTITUTIONAL LAW 267, at 271 (Eibe H. Riedel & Rüdiger Wolfrum eds., 2006).

[187] Levitt, *supra* note 82, at 197–198; and Seibert-Fohr, *supra* note 81, at 502.

[188] Mak, *supra* note 89.

[189] *See* Gutan, *supra* note 67; and Iancu, *supra* note 67, at 594–596.

[190] *See* Gutan, *supra* note 67. Note that the mandate of court presidents shall be prolonged to four years.

powers.[191] Thus, court presidents are designed more as "administrators of the courts rather than actual leaders".[192]

Italy and Ireland also seem to belong to this type, even though their court presidents are a bit stronger than their Romanian, German and Dutch counterparts. Italian court presidents, beyond standard administrative tasks, participate in the process of evaluating judges and have retained some influence over allocation of cases.[193] Irish court presidents also play an important role in disposal and allocation of cases and setting the policy, but they have only limited powers vis-à-vis their colleagues on the bench. This internal independence of rank-and-file judges vis-à-vis court presidents is further buttressed by "a very strong cultural conception of *individual* judicial independence, which has traditionally overshadowed corporate or collective judicial independence",[194] and the fact that Irish judges are not socialized within the judiciary and instead join the bench as already successful leading figures of the Bar and other legal professions. However, Irish court presidents have a say in selection of new judges and their last-minute fightback in the Irish parliament against the 2018 judicial reform that could limit their role in this area shows their strength.[195]

In the second type, the "boss", a court president decides on case assignment, evaluates judges of her court and has significant influence over their promotion, decides when judges should be disciplined, influences well-being of judges through various discretionary perks such as vacation packages, help in obtaining apartments or getting children into schools or nurseries, operates as a power broker with local or national political leaders, and is usually active in the media and as ambassador of a given court. This model exists in Russia[196] and many post-Soviet states.[197] As Solomon has pointed out, "[t]he chair of the court in Russia is and remains a 'boss', a super authority who manages his domain and

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[191] *See* Gutan, *supra* note 67.

[192] *See* Gutan, *supra* note 67.

[193] Benvenuti & Paris, *supra* note 89.

[194] O'Brien, *supra* note 70.

[195] *See* Michael O'Regan, *Judicial appointments Bill passes in Dáil and now goes to Seanad,* THE IRISH TIMES (May 31, 2018), https://www.irishtimes.com/news/politics/oireachtas/judicial-appointments-bill-passes-in-d%C3%A1il-and-now-goes-to-seanad-1.3515540?mode=amp.

[196] *See* Solomon 2010, above note 41; Solomon 2012, *supra* note 41; and Schwartz & Sykiainen, *supra* note 36, in particular at 995-996, 1003, 1008–1009, 1012, 1018–1027 and 1031–1034; and Popova, *supra* note 41.

[197] *See* Müller, *supra* note 41, at 965 (on Ukraine, Moldova, Armenia, Azaerbaijan and Belarus); Popova, *supra* note 41 (on Ukraine); and Alexei Trochev, *Patronal politics, judicial networks and collective judicial autonomy in post-Soviet Ukraine*, 39 INTERNATIONAL POLITICAL SCIENCE REVIEW 662 (2018), at 670–674.

represents the court in the outside world, including in informal dealings with local authorities, whose support still matters for the well-being of the court".[198]

These two types can also be seen as two sides of the continuum. Most European judiciaries covered by this study lie somewhere in between these two poles. This is the case of Czechia, Slovenia, the CJEU, Poland, Slovakia, the ECtHR, and France. Within this group we can trace three configurations of powers that result in the following three tentative types – the judicial leader type (Czechia, Slovenia, the CJEU), the judicial diplomat type (the ECtHR) and the manager type (Poland, Slovakia and France).

The court president as a judicial leader is not as strong as Russian court presidents, because he is not a boss who may to a great extent affect well-being of rank-and-file judges. However, she still has not only broad ambassadorial and media power, but also has a major say in case assignment and panel composition (administrative power). In addition, she usually wields significant jurisprudential power through setting the rules of the debate, opinion assignment and shaping the law (the CJEU and Czechia) and often has major say over judicial careers, either in selecting and disciplining (Czechia) or in promoting judges (Slovenia).

The court president as a manager combines weak ambassadorial, media and financial powers with at least intermediate power over allocation of cases, important say in careers of individual judges and strong jurisprudential power. Therefore, managers tend to be strong regarding the internal powers vis-à-vis their colleagues on their court, but are less active in external relations. The typical examples of this type are Poland and Slovakia. France comes close too, but French court presidents seem to have less jurisprudential power than their Polish and Slovak colleagues.

In contrast, the court president as a judicial diplomat has weak power over the career of her colleagues and their well-being and little influence on allocation of cases, but he wields significant power over the staff of her court and has extensive ambassadorial and media power as well as intermediate jurisprudential power. The limited financial power and power over judicial careers distinguishes this type from the judicial leader type, the boss type as well as from the managerial type. However, her ambassadorial, media and jurisprudential power sets judicial diplomat apart from the *primus inter pares* type. Out of our 13 jurisdictions, only the ECtHR President fits this type. Her power lies primarily in her "diplomatic missions" to the domestic courts and parliaments. her broad media activity, her formal authority to wield power over the Registrar and the staff of the ECtHR, the fact that she sits automatically at the Grand Chamber formations, in having informal influence in choosing the cases to be identified as pilot judgments, and in acting as a power broker

[198] *Ibid*., at 354. *See* also Solomon, *supra* note 41.

between the different Sections of the ECtHR with regard to referrals of cases to the Grand Chamber.[199]

II. Weak Court Presidents in Western Europe vs. Strong Court Presidents in Eastern Europe: A Seductive but False Simplification

In the Court Presidents Power Index we categorized court presidents in 13 European jurisdictions according to how strong they are and identified five types of court presidents. In this subsection we build on this categorization and revisit the claim that there is a clear West/East division regarding the roles of court presidents in Europe. In order to do so, we analyze to what extent this position corresponds to our findings regarding each component of court presidents' power as well as regarding the overall strength of court presidents.

The standard account in the literature suggests that there is a huge divide between the powers of court presidents in Eastern Europe on the one hand and court presidents in Western Europe on the other.[200] This claim also implicitly conveys the message that the power of court presidents in each part of Europe is relatively uniform. Regarding Eastern Europe, Kosař has argued that court presidents are invisible masters of the CEE judiciaries irrespective of the model of court administration in place,[201] even though their powers may in some countries be rather fragile.[202] This is so because "[t]hey are the key principals of individual judges […,] have the best overview of what is going on within the judiciary […, and t]hey can use the most important stick in the civil law judiciaries (disciplinary motion) and have a major say in the most important carrot (promotion of judges)".[203] In other words, information asymmetry and political capital further buttress their formal and informal powers. Other authors writing on courts in the CEE concur.[204]

In contrast, the strength and importance of court presidents in CEE which make up an important part of the discourse on the CEE judiciaries "appear alien to jurists in many

[199] Çalı & Cunningham, *supra* note 29.

[200] *See supra* note 60.

[201] Kosař, *supra* note 9, at 390–398.

[202] Kosař, *supra* note 11, at 110–114.

[203] Kosař, *supra* note 9, at 390.

[204] *See* e.g. Bobek, *supra* note 35, at 253–254 (on Czechia); or Piana, *supra* note 37, at 43–44 (on Czechia, Hungary, Poland, Bulgaria and Romania); Solomon, *supra* note 41, at 354 (on Russia); Müller, *supra* note 41, at 965 (Ukraine, Moldova, Armenia, Azaerbaijan and Belarus); Schwartz & Sykiainen, *supra* note 36, in particular at 995–996, 1003, 1008–1009, 1012, 1018–1027 and 1031–1034 (on Russia); and, on Slovakia, Alexander Bröstl, *At the Crossroads on the Way to an Independent Slovak Judiciary*, In SYSTEMS OF JUSTICE IN TRANSITION: CENTRAL EUROPEAN EXPERIENCES SINCE 1989 (Jiří Přibáň, Pauline Roberts & James Young eds., 2003) at 141, 143.

Western Member States".[205] According to this account, even in countries such as Germany in which court presidents wielded historically broad powers, they have undergone significant transformation and lost most of their powers.[206] Some commentators even suggested that, as a result of these changes, German court presidents "have lost the capacity to give instructions to rank and file judges on matters related to particular cases … and … come closer to the common law model of *primus inter pares* than the dominant figure (boss) normally associated with court heads in the civil law world".[207] Other established democracies in Western Europe likewise reduced the role of hierarchical oversight within their judiciaries over the past 50 years and changed the role of court presidents profoundly.[208] The only area where Western European court presidents, according to this account, seem to have retained some of their former power over rank and file judges is the promotion of judges.[209]

In other words, the existing literature suggests that court presidents are strong players in Eastern Europe, whereas in Western Europe they have become rather representative figures. However, both our Court Presidents Power Index and the several contributions to this special issue challenge this view. Most importantly, Romanian court presidents do not fit into this simple dichotomy as they rank among the weakest in our set of 13 jurisdictions. They operate as "first among equals", similarly to court presidents in Germany, and the Netherlands. They are weaker than their counterparts in Italy, Ireland and France. Conversely, French court presidents have still retained significant powers as they not only have major influence on allocation of cases, but also have their say in selection and promotion of judges. Moreover, if we add the CJEU's President into the picture, the power of court presidents in many CEE countries look relatively meager. In fact, the CJEU's President ranks among the strongest in Europe and is a true judicial leader. He not only has extensive jurisprudential, ambassadorial and media power, but also enjoys significant discretion in case assignment and through determining the composition of the Article 255 Panel also influences selection of new CJEU's judges. If we leave Russia aside, only Czech court presidents are arguably stronger.

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[205] Wallerman, *supra* note 60, at 676–677.

[206] *See* Riedel, *supra* note 185, at 69, 98–107; Seibert-Fohr, *supra* note 186, at 267, 271; Solomon, *supra* note 41; Levitt, *supra* note 82, at 197–198; and Seibert-Fohr, *supra* note 81, at 502 (these two authors suggest that judges who seek promotion may be tempted to adjust their decision-making according to the views of their court presidents).

[207] Solomon, *supra* note 41, at 918.

[208] Anja Seibert-Fohr, *Judicial Independence – The Normativity of an Evolving Transnational Principle*, In Seibert-Fohr, *supra* note 17, at 1279, 1329.

[209] *See* Levitt, *supra* note 82, at 197–198 (on Germany); and Seibert-Fohr, *supra* note 81, at 502 (on Germany); Garapon & Epineuse, *supra* note 78, at 285–286 (on France).

In fact, when we look at our Court Presidents Power Index without any bias, we can see that while court presidents in some CEE countries are on the upper side of the continuum, it is difficult to draw the easy line along the West/East axis. Importantly, Romanian case study shows that strong court presidents are not an inherent feature of all CEE judiciaries and that it is possible to reduce the power court presidents in the CEE context. What emerges clearly is a more complex picture: even though Western European court presidents are in general weaker than their Eastern European counterparts (with exception of Romania), powers of court presidents diverge within Western Europe as well as within Eastern Europe. What is more, powers of court presidents differ also between the CJEU and the ECtHR. Put differently, there is no consensus regarding the role of court presidents in Europe, neither on the domestic nor on the transnational level. To make things even more complicated, powers of court presidents do not automatically translate into their influence, which is dependent on various contingent circumstances. We will analyze these contingent circumstances in the next Part.

D. Powers Do Not Automatically Translate into Influence: Contingent Circumstances Can Make the Difference

In the previous two Parts we categorized powers of court presidents, developed the Court Presidents Power Index and identified the five types of court presidents. In this Part we will problematize this index and show that powers are not necessarily the only factor that determines the influence of court presidents. We argue that there are other determinants that may restrain or bolster the utilization of powers of court presidents. We refer to these additional determinants as the contingent circumstances of court presidents' power. These contingent circumstances include the length of term of court presidents, the existence of information asymmetry, the structure of the judiciary, the existence of competing bodies, the role of individuals, the proximity of court presidents to political leaders, and the influence of the legal profession, legal culture, and political environment.

The existence of these contingent circumstances does not mean that the Court Presidents Power Index is to a large extent irrelevant (and we certainly do not want to convey this message), and that it all depends on, for instance, legal culture or who holds this office. To the contrary, this index still matters, because the interaction between powers of court presidents and contingent circumstances is mutual. For instance, the scope of powers of court presidents also shapes legal culture and determines what type of judges seek to hold this office. It is thus important to keep this interaction in mind when analyzing contingent circumstances in individual jurisdictions.

First, the longer *the term of court presidents*, the more power they arguably wield. The long term of office allows the court president to leave a greater imprint on the law, to master all her competences, to develop a deeper knowledge of judges of her court, to expand her networks, to foster her relationship with the media, and to increase her ambassadorial activities. Especially if the term of a court president significantly surpasses

the term of office of the members of the legislature and the executive, she may be particularly valued for her institutional memory and politicians may be forced to rely on her knowledge in personal decisions within the judiciary. Not surprisingly, the governments that intend to curtail the role of court presidents try to limit their term in office. This can be done formally as well as informally. For instance, the Czech Parliament introduced a non-renewable term[210] for court presidents in 2008 in order to reduce their influence within the Czech judiciary.[211]

A more intriguing technique is to select court presidents from among judges whose age is close to a compulsory retirement age.[212] In contrast the most blatant technique is dismissal of "unwanted" court presidents.[213] Finally, sometimes the reduction of the length of a court president's term is just an unintended consequence of a judicial reform aimed primarily at something else. This might be the case of the ECtHR, where the introduction of a non-renewable nine-year term for Strasbourg judges in 2010 also shortened the potential length of term of the ECtHR's President. Put differently, no one can become such a towering figure like Rolv Ryssdal, who presided over the Strasbourg Court for 13 years (1985-1998), or Luzius Wildhaber, who led the ECtHR from 1998 to 2007.[214] This institutional change, brought about by Protocol No. 14, thus arguably made the ECtHR's presidents de facto weaker than their counterparts at the CJEU, where a renewable term for judges is still allowed.[215]

The second factor, *information asymmetry*, is closely connected with this one. Wide information asymmetry can significantly boost court presidents' powers, as they are much closer to what is going on in the judiciary, and other stakeholders may be forced, however reluctantly, to rely on their knowledge in making the policy as well as personal decisions on the judiciary.[216] On the other hand, enhanced transparency may limit court presidents' discretion in the exercise of their powers, as it increases public control and may even result in holding court presidents to account for their actions.[217]

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[210] The term ranges from seven to ten years, depending on the tier of the Czech judiciary.

[211] *See* e. g. Kosař, *supra* note 11; and Blisa, Papoušková & Urbániková, *supra* note 89.

[212] This is a common practice (at least for apex courts) in Japan; *see* David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan,* 87 TEXAS LAW REVIEW 1545 (2009).

[213] *See* notes 1–17.

[214] In fact, none of Wildhaber's successors (Jean-Paul Costa, Nicholas Bratza, Dean Spielmann, and Guido Raimundi) presided over the ECtHR for more than 5 years (and usually much less).

[215] Note that Gil Carlos Rodríguez Iglesias held the office of the CJEU President for 9 years (1994–2003), Vassilios Skouris for 13 years (2003–2015), and Koen Lenaerts has been the CJEU's President since 2015.

[216] This has happened in Czechia. *See* Kosař, *supra* note 11; and Blisa, Papoušková & Urbániková, *supra* note 89.

[217] This seems to be the case in Slovakia. *See* Spáč, Šipulová & Urbániková, *supra* note 77.

The next two factors concern institutional design issues. The third factor is the *structure of the judiciary*. One may argue that the strictly hierarchical judiciary with few appellate and apex court presidents makes them stronger than the flat structure with multiple special courts. For instance, the Slovak judiciary that resembles a simple pyramidal shape of three court tiers (district courts, regional courts and one Supreme Court)[218] with no special courts[219] increases the role of court presidents. Similarly, the Czech judicial system also follows a hierarchical pattern, but it consists of four tiers (district courts, regional courts, high courts, the Supreme Court) and features a specialized apex court for administrative law matters, the Supreme Administrative Court.[220] The structure of the Slovenian judicial system is also relatively hierarchical, but it arguably dilutes the power of court presidents even more than in the Czech Republic, as Slovenia has not only a four-tiered judicial system and the separate Administrative Court, but also specialized labor and social courts and the Court of Audit.[221] But that is nothing in contrast to judiciaries in the established democracies covered by this special issue. Ireland's judiciary consists of five tiers of general courts and a plethora of special tribunals. France is well-known for its convoluted judicial system and the two-headed judiciary, in which criminal and civil judges (*magistrates*) follow a different path than the administrative tribunals headed by the *Conseil d'État*.[222] In Germany, only at the federal level are there as many as five separate judiciaries with their own apex court (*Bundesgerichtshof*, *Bundesverwaltungsgericht*, *Bundesarbeitsgericht*, *Bundesfinanzhof*, *Bundessozialgericht*).[223] In addition, Germany also created a federal patents court, the *Bundespatentgericht,* and special disciplinary courts.[224] Such a flat structure inevitably reduced the powers of court presidents who are just one among many.

The fourth factor that emerges from this special issue clearly is the *existence of other competing JSG bodies* such as judicial councils or judicial appointment commissions. It is no surprise that (leaving aside Russia) court presidents wield the strongest power in Czechia,

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[218] *See* Spáč, Šipulová & Urbániková, *supra* note 77; and Kosař, *supra* note 9, at 254–264.

[219] Note that there is the Specialized Criminal Court, established in 2009, but it operates in a very similar way as the general criminal courts and its judgments can be appealed to the Slovak Supreme Court.

[220] *See* Blisa, Papoušková & Urbániková, *supra* note 89; and Kosař, *supra* note 9, at 181–187.

[221] *See* Avbelj, *supra* note 76.

[222] *See* Vauchez, *supra* note 78; Garapon & Epineuse, *supra* note 78; SERGE GUINCHARD, GABRIEL MONTAGNIER, ANDRÉ VARINARD & THIERRY DEBARD, INSTITUTIONS JUDICIAIRES (2013); BENOÎT GARNOT, HISTOIRE DE LA JUSTICE. FRANCE, XVIE–XXIE SIÉCLE (2009); and BRUNO LATOUR, THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ETAT (2010).

[223] *See* FABIAN WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT (2006); WERNER HEUN, THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS (2011), at 166–167; Wittreck, *supra* note 92.

[224] *See ibid*.

where no such competing body exists.[225] In contrast, in all five countries on the other side of the Court Presidents Power Index (Germany, Ireland, Italy, the Netherlands, and Romania)[226] court presidents have to compete for power in an increasingly crowded space. In Italy and Romania court presidents face a strong judicial council, which has over the years taken away some of their powers and weakened hierarchical supervision more generally.[227] In the Netherlands court presidents have to interact with the three-member Management Board established at every court of first instance and court of appeal as well as with the nation-wide Council for the Judiciary.[228] In Ireland court presidents have to guard their powers against the Court Service, the Judicial Appointments Advisory Board (from 2018 to be replaced by the Judicial Appointments Commission), and soon perhaps also against a judicial council.[229] The German contribution then shows that the powers of court presidents can be diluted even in the absence of a nation-wide JSG body such as a judicial council, a courts service, or a judicial appointments board. While the influence of court presidents varies from one *Land* to another, each of them faces a plethora of JSG bodies on the court level (Presidia) as well as on the *Land* level (Councils of Judges, Councils of Judicial Appointment, Service Courts, and Committees for Selection of Judges).[230]

Apart from institutional factors, we should not forget that individuals matter too. While this article is primarily about the institution of the court president, *individuals holding this office* may significantly affect the authority and legitimacy of this institution, which in turn determines real influence of court presidents in a given jurisdiction.[231] This is particularly true for the Chief Justices. More specifically, an individual Chief Justice may transfer her authority and legitimacy to an institution of the Chief Justice. The typical example is the President of the CJEU Koen Lenaerts, who has been a prolific scholar and has been considered as one of the intellectual leaders in the field of EU law, is a skillful judicial

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[225] *See* Blisa, Papoušková & Urbániková, *supra* note 89.

[226] *See* Part C.I.

[227] *See* Benvenuti & Paris, *supra* note 89; CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002), at 54–55; or Carlo Guarnieri, *Judicial Independence in Europe: Threat or Resource for Democracy?*, 49 REPRESENTATION 347 (2013), at 348 (all on Italy); and Gutan, *supra* note 67; and Iancu, *supra* note 67, at 594–596 (both on Romania).

[228] Mak, *supra* note 89.

[229] O'Brien, *supra* note 70. However, the proposed Judicial Council will be chaired by the Chief Justice and it is unlikely (at least in the short term) that the fairly consensual approach that has been taken by successive Chief Justices in relation to the Courts Service would not also be carried through into the operation of the Judicial Council.

[230] Wittreck, *supra* note 92.

[231] We are grateful for this insight to Julio Ríos-Figueroa.

diplomat and is well-connected not only within the EU institutions but also within legal academia, speaks several other languages beyond French and English, and is well-regarded by legal community both in Europe and on the other side of the Atlantic.[232] Beyond Europe the Canadian Chief Justice Beverley McLachlin[233] and the Pakistani Chief Justice Iftikhar Chaudhry[234] have arguably achieved the same status. Such Chief Justices can use their gravitas to increase their visibility and influence within their legal systems. The downside is that once these towering figures step down, some of their individual authority and legitimacy might go away too and the new Chief Justice might be much less influential.[235] At the same time, we must not forget that individual Chief Justice may also erode the authority and legitimacy of the institution of the Chief Justice. Here the Slovak Chief Justice Štefan Harabin[236] and the Chief Justice of the Supreme Court of the United States Roger Taney[237] come to mind. The Slovak contribution to this special issue also shows how difficult it is to restore the lost reputation of the office of the Chief Justice.[238]

This brings us to the sixth factor, the *proximity of court presidents to political leaders*. Court presidents who belong to the social milieu of the political elite have better access to key stakeholders and may use this lobbying capacity to resist, initiate, adopt and implement judicial (and legal reforms) and counter-reforms. In several countries judges can be temporarily assigned to the Ministry of Justice and other state organs,[239] which allows them to use these contacts later on once they become court presidents. Many CEE countries witnessed the phenomenon of "superjudges".[240] By a "superjudge" we mean a professional judge who at some point of her career became the minister or vice-minister and then returned to the judiciary. The sequence is important. A "superjudge" had been a judge before she joined the executive and then returned to the judiciary, empowered by all the knowledge and contacts she made within the executive branch. As shown above,

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[232] Wittreck, *supra* note 92.

[233] *See* I-CONnect Symposium on the Legacy of Beverley McLachlin, Chief Justice of Canada; and in particular David, *supra* note 142.

[234] *See supra* notes 22 and 244.

[235] This makes the choice of their successors extremely difficult.

[236] *See* Kosař, *supra* note 9, at 320–321, 327–329; and Spáč, Šipulová & Urbániková, *supra* note 77.

[237] Chief Justice Roger Taney delivered the infamous majority opinion in *Dred Scott v. Sandford* (60 U.S. (19 How.) 393 (1857)), ruling that African Americans could not be considered citizens and that Congress could not prohibit slavery in the territories of the United States. For further details, *see* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (2001).

[238] *See* Spáč, Šipulová & Urbániková, *supra* note 77.

[239] This is a standard practice in Austria, Germany and France (for *Conseillers d'État*).

[240] For further details, *see* Kosař, *supra* note 9, at 173–176, 248–250.

such "travelling among branches" is not specific to CEE. However, for historical reasons this practice is particularly troubling in post-communist judicial systems.[241] In semi-authoritarian regimes proximity to political leaders plays even greater role, since being integrated in the ruling patronal network or the ruling family brings about more perks and might be crucial for the long-term survival of court presidents.[242]

The final set of factors involves a broader legal and political background. The varying *influence of the legal profession* is the seventh factor. Especially in common law countries, where the connection between the bench and the Bar is particularly strong, the legal profession may empower as well as constrain court presidents. Typically, the legal profession may play a gate-keeping role and its structure may affect judicial selection.[243] At the same time, lawyers may mobilize the people against political attack on court presidents. We saw this most clearly in Pakistan after General Pervez Musharaff suspended Chief Justice Iftikhar Chaudhry.[244] However, even in Poland some members of the legal profession have come out strongly against the Law and Justice Party's attempt to get rid of the Polish Supreme Court President, Małgorzata Gersdorf.[245]

The eighth factor is *legal culture*, which is even more deeply embedded than the role of the legal profession. Most importantly, despite the growing convergence between the "career" and "recognition" judiciaries,[246] they still produce different types of identity within the judiciary. Distinctive features of both models are well-known.[247] Here it suffices to say that career judges who enter the judiciary at a relatively young age at the bottom of the judicial hierarchy and become fully socialized within the judicial ranks are more prone to deferring to court presidents than judges in recognition judiciaries who join the bench no sooner than in the middle of their careers with life wisdom and experience gained outside the judiciary.[248] Put differently, career judiciaries tend to be more hierarchical and tend to deny individual identity to judges, whereas the recognition judiciaries largely

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[241] *See ibid*.

[242] *See* Trochev, *supra* note 197, at 670–674.

[243] Lizzie Barmes & Kate Malleson, *The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity,* 74 THE MODERN LAW REVIEW 245 (2011).

[244] Ghias, *supra* note 22.

[245] *See* note 5 above.

[246] *See* Nicholas Georgakopoulos, *Independence in the Career and Recognition Judiciary*, 7 U. CHI. L. SCH. ROUNDTABLE 205 (2000); or Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation Versus Legal Tradition,* 3 JOURNAL OF LEGAL ANALYSIS 411 (2011).

[247] *See supra* notes 52 and 146.

[248] Kosař, *supra* note 9, at 113–120.

revolve around the notion of individuality.[249] This explains that court presidents are not considered "superiors" of other judges in recognition models. In contrast, hierarchical[250] judiciaries tend to leave more room for maneuver to court presidents.

Finally, the *political culture* makes a difference too. For instance, while politicians in Western Europe do not consider the dismissal of a court president as a legitimate strategy, their counterparts in Eastern Europe resort to this measure quite often.[251] At the same time, court presidents in Western Europe who commit problematic acts tend to resign voluntarily amid the pressure from their peers and political culture. In contrast, court presidents in Eastern Europe in similar situation tend to fight until the bitter end. [252] Finally, *political environment* which is hostile to judges, such as the recent situation in Poland,[253] inevitably puts court presidents under heavy pressure, because they are viewed as representatives of the judiciary and thus they easily end up in a direct conflict with political leaders.

To sum up, the fact that court presidents have the majority of the powers discussed in Part B does not necessarily mean that they can and will use all of these powers in practice and that they can and will stretch them to their limits. Put differently, powers in the meaning of faculty do not necessarily translate into power in the meaning of influence. This depends on several contingent circumstances that are difficult to quantify. This does not undermine the Court Presidents Power Index, but merely suggests that a complete account of how court presidents maintain their power can be adequately presented only with respect to a particular jurisdiction and only with deep knowledge of the functioning of the given judiciary, both in the *de iure* and *de facto* dimensions, and accounting for the political and historical background.

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[249] Sophie Boyron, *The Independence of the Judiciary: A Question of Identity*, In INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2006), at 77, 77–78. *See* also Mirjan Damaška's famous distinction between the hierarchical ideal of the officialdom and the coordinate ideal of officialdom (MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986) at 16–46 and 181–239.

[250] We are, of course, aware that there are other factors than the career/recognition distinction that may affext the strength of hierarchical principle.

[251] *See* notes 1–17.

[252] *See* Spáč, Šipulová & Urbániková, *supra* note 77 (regarding the former Chief Justice of the Slovak Republic Štefan Harabin).

[253] *See* Śledzińska-Simon 2018, *supra* note 4.

E. Conclusion

This article showed the multiple roles court presidents play in domestic as well as transnational judiciaries. They may wield broad powers, ranging from power over judicial careers of their colleagues on the bench, case assignment, and jurisprudential power, to financial power, ambassadorial and media power. We also analyzed 13 European jurisdictions and ranked their court presidents according the strength of their power. This resulted in the Court Presidents Power Index, first of its kind, which showed various configurations of court presidents' powers and allowed us to identify five types of court presidents: court president as a boss, court president as a judicial leader, court president as a manager, court president as a judicial diplomat, and court president as a *primus inter pares*. Our index also forces us to rethink the traditional view that Eastern European court presidents are much stronger than their counterparts in Western Europe, since the West/East division regarding the powers of court presidents is not as clear as presented in the existing literature.

We also identified several promising avenues for further research. First, we need to take stock of other jurisdictions and work more on the types of court presidents, both in Europe and beyond. Second, further research should distinguish between different tiers of the judiciary in which court presidents operate. We should probably single out Chief Justices, as they have unique position. It is also clear that the powers of presidents of appellate courts may differ from the powers of presidents of lower courts. To add to complexity, apex court presidents do not necessarily have more influence than other court presidents. For instance, in Czechia regional court presidents arguably wield more power than the President of the Supreme Court and the President of the Supreme Administrative Court.[254] We need to understand how this has happened and under what circumstances such phenomenon persists.

The contributions to this special issue also showed that court presidents play a major role in judicial politics and thus it is particularly interesting to explore how they react to the introduction of a new judicial self-governance body. Under what circumstances do they resist such reform? If the resistance does not succeed, do they embrace the new JSG body or do they try to weaken, contest or even capture it? Under what circumstances they may succeed and what techniques they use to achieve that end? We may also inquire how court presidents interact with other bodies involved in judicial governance and with politicians. In fact, political contestation between court presidents and political leaders has been quite common recently.[255] The ongoing conflict between the Polish Supreme Court President, Małgorzata Gersdorf, and Law and Justice Government has even become one of the key issues in the debate about the future of the European Union.

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[254] *See* Blisa, Papoušková & Urbániková, *supra* note 89.

[255] *See* notes 1–17.

This brings us to the next important question: Are there some powers of court presidents that are more prone to political attack? We may also rephrase this question and ask whether a particular type of court presidents is more susceptible to political backlash. In order to answer these two questions, we first need to understand why politicians want to get rid of 'problematic' court presidents. Do they want to improve efficiency and leadership, change the perception of the given court by the public or incrementally shift the course of law? Or they just need to have sufficient and reliable information what is going on in the judiciary? Or do they rather intend to silence or side-line their critics, suppress judicial dissent, pave the way for bringing in more loyal personnel, and ensure that the courts will yield judgments favoring the ruling political elite? In the worst case scenario, do politicians want to use court presidents as transmission belts[256] to openly advance their agenda? This approach has an important advantage for the ruthless political leaders – by "outsourcing" judicial interferences to court presidents, political leaders can easily protect themselves from criticism for direct meddling with the judiciary, because using court presidents to advance their agenda is more opaque than purging the judicial corps or using coercion.[257]

The attempts of taming 'recalcitrant' court presidents in Hungary, Poland, Slovakia and Ukraine[258] also bring to the fore what can be done to prevent this from happening or at least to minimize the incentives to meddle with selection and dismissal court presidents. One policy implication comes to mind immediately – to go normative and reduce the powers of court presidents, especially in post-communist countries. To be sure, it is a simple and seductive solution. However, is it the right path? If we take away some power from court presidents, this power does not disappear. It will be transferred to someone else. Therefore, we would have to think twice whom should we transfer this power to and whether such transferal would not make things even worse. Moreover, we also have a potential counterfactual, since Romania's judiciary does not fare well,[259] despite having relatively weak court presidents.[260]

There are simply many pressing questions and few answers. In order to answer these questions, we need to broaden our horizons and analyze judicial self-governance from a

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[256] On the transmission belt metaphor, *see* note 123.

[257] Alexei Trochev, *Judicial Clientelism in Kazakhstan*, (unpublished manuscript, on file with authors). *See* also notes 18–19.

[258] *See* notes 1–17.

[259] *See* Gutan, *supra* note 67; and Iancu, *supra* note 67, at 594–596.

[260] *See ibid*; and Part C.

more holistic view and look beyond traditional suspects such as judicial councils and judicial appointment committees. Only then we may come closer to understanding the place of court presidents in the puzzle of judicial governance.

Articles

Recruiting European Judges in the Age of Judicial Self-Government

By Samuel Spáč[*]

Abstract

Through the recruitment of judges – their selection and subsequent appointment – powerful actors control who enters the judicial ranks and under what circumstances. In this paper I address how are European judges recruited using examples from ten European countries, while paying special attention to the role of the judicial self-government in these processes. Indeed, there are differences between recruitment processes across Europe. In some countries, a central role in the judicial recruitment is played by judicial schools; elsewhere crucial powers belong to judicial councils and/or other bodies of judicial self-government; in the UK or Ireland some of these powers were vested in the hands of specialized bodies; whereas in other countries the process remains less formal with crucial powers resting in the hands of court presidents. Despite these differences, I choose to emphasize similarities recruitment processes share. They operate as funnels where the pool of candidates gradually decreases until only one (or few) remains and is eventually appointed. In order to assume judicial office one usually must (a) meet eligibility criteria, (b) get on selector's radar to be actively considered for the position, (c) get shortlisted for the position, (d) get selected, and (e) eventually appointed. Dividing the recruitment process into these stages, while paying attention to motivations of all involved actors, can help deepen our understanding of how judicial recruitment actually works and how formal and informal rules together shape the composition of judiciaries.

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A. Introduction

Through the recruitment of judges – their selection and subsequent appointment – powerful actors control who enters the judicial ranks and under what circumstances. A vast literature has been dedicated to this topic, mainly in common law countries,[1] Constitutional courts around the world,[2] or international courts.[3] Scholarly attention[4] paid to judicial recruitment in ordinary judiciaries has mainly focused on the procedures and formal bodies involved in the process.[5] Nevertheless, the question of how the process actually translates into the composition of the judiciary certainly has consequences for the expertise and quality of the bench,[6] while it also affects such issues as diversity and representativeness of the judiciary, which are important from the perspective of representative democracy.[7] In addition, as recruitment establishes a link between the selector and the judge, it can be linked with the independence of individual judges as well as judiciaries in collective terms.[8] Once the judges are appointed, their performance affects public attitudes towards judicial institutions, as well as political institutions in a broader

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[1] E.g. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure,* 26 CARDOZO L.R. 597 (2015); Lee Epstein & Jack Knight & Olga Shevtsova, *Comparing Judicial Selection Systems*, 10 WILLIAM & MARY 7 (2007); Kate Malleson, *Rethinking the Merit Principle in Judicial Selection*, 33 JOURNAL OF LAW & SOCIETY 126 (2006); JAN VAN ZYL SMIT, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES (2015); DEBATING JUDICIAL APPOINTMENTS IN THE AGE OF DIVERSITY (Graham Gee & Erika Rackley eds., 2018).

[2] E.g. Charles Manga Fombad, *Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes,* 46 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW 249 (2014); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008).

[3] Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights,* 61 INTERNATIONAL ORGANIZATION 669 (2007); MICHAL BOBEK, SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS (OUP 2015).

[4] It needs to be admitted that in my research I am limited to the literature written in English, Slovak or Czech, hence there is a possibility that a considerable amount of research written in other languages is omitted.

[5] E.g. Carlo Guarnieri, *Appointment and career of judges in continental Europe: the rise of judicial self-government*, 24 LEGAL STUDIES 169 (2004); JOHN BELL, JUDICIARIES WITHIN EUROPE. A COMPARATIVE REVIEW (2006); RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE (Giuseppe Di Federico ed., 2005); or some chapters in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER (Kate Malleson & Peter H. Russell eds., 2006).

[6] E.g. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection,* 67 ALBANY L.R. 803 (2004).

[7] E.g. Bell, *supra* note 5, regularly addresses the representation of women; Malleson, *supra* note 1; Kate Malleson, *The Disruptive Potential of Ceiling Quotas in Addressing the Over-Representation in the Judiciary, in* DEBATING JUDICIAL APPOINTMENTS IN THE AGE OF DIVERSITY 259 (Graham Gee & Erika Rackley eds., 2018); Erika Rackley, *Women, Judging and the judiciary: from difference to diversity* (2013); and even CEPEJ reports address the share of women in European judiciaries, *see* for instance: Council of Europe, *European Commission for the Efficiency of Justice, European judicial systems: Efficiency and quality of justice* 97-101 (2016).

[8] Charles G. Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 THE GEORGETOWN JOURNAL OF LEGAL ETHICS 1259 (2008).

sense,[9] the state of the rule of law,[10] and can be even connected to economic performance.[11]

Over the last couple of decades, the world has observed an undeniable increase of judicial power and a growing involvement of judges in the administration of judiciaries.[12] Judicial recruitment was one of the central issues in the debates surrounding it. In Europe, these changes were supported and encouraged by a variety of international documents, mainly backed by the European Commission and the Council of Europe.[13] As early as in the 1980s, the ECtHR case law developed criteria for the assessment of independence of a tribunal; the manner through which members of such a body are appointed was one of them.[14] Judgments remained rather vague as to what a proper mechanism is for appointment that would meet these criteria, therefore a variety of 'soft law' documents provided more guidance in the following years.[15] As these recommendations were usually created by an international network of judges, perhaps 'it is not surprising that [they] are based on the

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[9] E.g. Marc Bühlmann & Ruth Kunz, *Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems,* 34 WEST EUROPEAN POLITICS 317 (2011); or for an overview *see* Marína Urbániková & Katarína Šipulová, *The Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?* (in this special issue).

[10] E.g. Maria Popova, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE (2012).

[11] E.g. Mathieu Chemin, *Do judiciaries matter for development? Evidence from India*, 37 JOURNAL OF COMPARATIVE ECONOMICS 230 (2009); Stefan Voigt, Jerg Gutmann & Lars Feld, *Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated Set of indicators*, 38 EUROPEAN JOURNAL OF POLITICAL ECONOMY 197 (2015); or J. Anthony Cookson, Economic Consequences of Judicial Institutions: Evidence from a Natural Experiment (2014), available at: https://extranet.sioe.org/uploads/isnie2014/cookson.pdf.

[12] *See* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence* in 57 THE AMERICAN JOURNAL OF COMPARATIVE LAW 103 (2009) at 123; Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence* in Wojciech Sadurski, Adam Czarnota & Martin Krygier, SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF EU ENLARGEMENT FOR THE RULE OF LAW 313 (2006); or David Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe* (in this special issue).

[13] *See* Smilov, *supra* note 12; Cristina E. Parau, *The Drive for Judicial Supremacy, in* JUDICIAL INDEPENDENCE IN TRANSITION 619 (Anja Seibert-Fohr ed., 2012); or David Kosař, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES 121-135 (2016).

[14] For an overview *see* Ann Power, *Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights* (International Bar Association Conference 2012). *See* also: ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, no. 6878/75; 7238/75; ECtHR, 28 June 1984, *Campbell and Fell v. The United Kingdom*, no. 7819/77; 7878/77; ECtHR, 22 June 1989, *Lanbgorger v. Sweden*, no. 11179/84, § 32.

[15] *See* Committee of Ministers of Council of Europe, *Recommendation No. R (94) 12 on the Independence, Efficiency and the Role of Judges*, particularly Principle I, Art. 2, par. C; Council of Europe, *European Charter on the Statute for Judges*, particularly Art. 1.3.; International Association of Judges, *The Universal Charter of the Judge*, particularly Art. 9. For more on the effect of 'soft law' on EctHR case law affecting judicial reforms in Europe *see* David Kosař, *Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights shapes domestic judicial design* in 13 UTRECHT L.R. 112 (2017).

belief that the rule of law is best served by judicial autonomy.'[16] There are two main conclusions that can be drawn from these documents with regard to judicial recruitment. First, they posit that the process of recruiting judges should be conducted by a body with substantial judicial representation that is independent of political branches. Second, they hold a belief that this should serve the idea of recruitment based on merit, hence on the basis of qualification, integrity, ability, and efficiency of candidates.

Initially, these recommendations were meant to apply mainly to post-communist countries in need of reforming their judicial systems. The 1994 Recommendation adopted by the Committee of Ministers of the Council of Europe allowed for different arrangements, if these tasks were traditionally conducted by the government leaving old democracies in the clear. A later recommendation adopted in 2010 has not been as understanding. The document prescribes that if decisions about judicial careers are carried out by political authorities, these powers should be transferred to 'an independent and competent authority drawn in substantial part from the judiciary',[17] which should be authorized to at least make recommendations or express opinions that relevant authorities should follow. This shift towards a greater involvement of judges in the administration of judicial careers has several common themes. First, it is based on a distrust towards political elites, conceiving insulation and de-politicization of the judiciary as a solution.[18] Second, there is a belief that decisions about careers – and recruitment of judges in particular – establishes a connection between selectors and prospective judges, which motivates selectors to choose candidates who would not act contradictorily to their preferences.[19] Third, it is based on the conviction that judges are on the one hand less dangerous than those in other branches, and on the other hand, that judges are more capable of securing continuity than changing governments or parliamentary majorities.[20]

In this paper I address two interconnected questions. First, how are judges in European countries recruited, and second, what is the role of judicial self-government in these processes given the rise of power of judges observable in recent decades? There is no

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[16] Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe* in 15 GERMAN L.J. 1257 (2014), at 1262; Parau, *supra* note 13, at 646-647.

[17] Committee of Ministers of Council of Europe, *Recommendation CM/Rec(2010)12 on Judges: independence, efficiency and responsibilities*, Art. 47.

[18] E.g. Parau, *supra* note 13, at 621; or Franck Emmert, *The Independence of Judges – A Concept Often Misuderstood in Central and Eastern Europe*, 3 EUROPEAN JOURNAL OF LAW REFORM 405 (2001).

[19] Not necessarily would a selector be ever willing to utilize such capacity. For more on 'willingness' and 'capacity' to pressure courts *see* Popova, *supra* note 10.

[20] For the discussion on factors that play in favor of judges in this context *see* Alan Paterson, *Power and Judicial Appointment: Squaring the Impossible Circle* in Gee & Rackley, *supra* note 1, particularly at 49 et seq. In terms of controlling access to a particular profession, judges are not that unique. *See* Keith M. MacDonald, *The sociology of professions* (1995).

doubt there are differences between these processes in different countries – from the formal criteria one must meet to become a judge, to actors deciding about who gets to enter the judicial ranks. However, I choose to emphasize similarities between these processes. Judicial recruitment operates like a funnel where candidates are gradually eliminated until only one – or a few – remain. To become a judge, candidates need to meet certain eligibility criteria, they need to 'get on the selectors' radar'; to be considered for a position, they need to meet the selectors' expectations to be shortlisted and eventually selected for the job; and finally, they need to assume the office through some formal appointment procedure.[21] By highlighting similarities in the process of recruiting judges, I aim to propose a framework that is applicable beyond the countries analyzed in this paper.

In addition, I argue that the recruitment process is – despite any merit-oriented efforts – far from a perfect competition. Everyone involved has specific interests and preferences regarding who should become a judge, and this skews the process. Indeed, these interests should not be necessarily perceived with a negative connotation, they may be absolutely legitimate, even virtuous. Nevertheless, they shape the process in such a way that increases chances of some candidates at the expense of others – be it on the basis of gender, race, or any other characteristic. Contrary to belief entrenched in the numerous international documents discussed earlier, I contend that judges are as fallible as any other actor when it comes to recruiting new judges. As some research shows, their interests can be aligned with the ruling elite;[22] they can have their own distinct interests stemming from the bureaucratic nature of the job,[23] or from the genuine belief only they can properly exercise this task.[24]

In summary, in order to analyze judicial recruitment and its consequences we not only need to identify the actors involved in the process, but also study their preferences and pay attention to the stages of the process in which they shape the recruitment. As the recruitment process operates like a funnel where candidates are gradually eliminated, some attention needs to be paid particularly to the question of what type of candidates do not have real chances of making it through the whole process. For instance, if judicial actors involved in the selection know that a certain type of candidate will eventually be vetoed by political actors, they may eliminate a candidate themselves. By contrast, if judges manage to ensure that only a specific type of candidate makes it through the

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[21] For a somewhat similar analogy *see* Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. (2007).

[22] E.g. Marc J. Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges so Conservative in Politically Charged Cases?*, 95 THE AMERICAN POLITICAL SCIENCE REVIEW 331 (2001).

[23] On the bureaucratic nature of judicial careers in some judicial systems *see* for instance: CARLO GUARNIERI & PATRICIA PEDERZOLI, THE POWER OF JUDGES (2002).

[24] E.g. Paterson, *supra* note 20.

process, they may effectively constrain political actors' formal powers. Either way, it is not only important who is involved in the process, but also at what stage.

The paper proceeds as follows. In Part B, I discuss judicial recruitment in the broader context of the literature on judicial careers literature, with a focus on different models of judicial selection practices. Part C analyzes models of judicial recruitment found in Europe with special attention paid to the openness and competitiveness of judicial recruitment, as well as the actors playing a central role in these processes. Four models are identified and analyzed in this part, with a specific focus on the structure of the process and the gradual decrease of the number of potential candidates competing for the position. In Part D, I highlight the need to address not only how these processes work formally, but also how the motivations and incentives of the involved actors translate into the composition of judiciaries and their diversity. Part E concludes.

B. Judicial Recruitment in a Broader Perspective

The way in which judges are recruited is often perceived as an inherent feature of a particular model of judicial careers. In the bureaucratic model of the judiciary, judges traditionally enter the judicial system at the lowest level at a very young age and remain there for most of the remainder of their careers. In the professional model, judges are recruited after a relatively successful career in other legal profession, hence at a relatively higher age. Scholarly literature generally seems to highlight differences between models of judicial careers and models of judicial selection. In this paper I contend that in Europe these differences seem to be gradually vanishing, and that despite some differences there are notable similarities between seemingly distinct processes. In this Part I first present a brief overview of the literature focusing on the ideal-types of judicial careers, followed by an overview of different models of judicial recruitment.

I. Models of Judicial careers

There are two ideal-types of judicial careers described by the scholarly literature. A bureaucratic model of judicial career,[25] also referred to as a 'career model',[26] resembles a career path typically found in civil-service,[27] and is typically found in countries with civil law tradition. According to Guarnieri and Pederzoli,[28] judges in this model are usually recruited

[25] *See* Guarnieri & Pederzoli, *supra* note 23; or Graham Gee, *The Persistent Politics of Judicial Selection: A Comparative Analysis, in* JUDICIAL INDEPENDENCE IN TRANSITION 121 (Anja Seibert-Fohr ed., 2012).

[26] Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation versus Legal Tradition*, 3 JOURNAL OF LEGAL ANALYSIS 411 (2011).

[27] *See* for instance: Volcansek, *supra* note 21; or Guarnieri, *supra* note 5.

[28] *See* Guarnieri & Pederzoli, *supra* note 23, at 66-67; or Gee, *supra* note 25.

directly from universities, without much emphasis on their previous experiences. Consequently, to ensure they have all the necessary skills, they are trained and socialized in the system – often in 'pre-judicial' positions as law clerks, so-called 'junior judges',[29] or Rechtspflegers.[30] Judges in bureaucratic judiciaries enter at the lowest rank and can work their way up the hierarchy, while their career prospects are dependent on superior or senior judges. Also, judges are usually generalists without expertise in any particular area of law, enabling them to perform satisfactorily anywhere the system needs them to. As a result, judges in bureaucratic judiciaries are to a large extent shaped by their superiors or more senior judges, which can lead to a self-perpetuation of attitudes, beliefs and practices within the judiciary,[31] while 'it also helps to forge a common sense of identity within the judiciary.'[32] Additionally, the fact that judges' career prospects are dependent on their superiors can threaten their internal independence as they can be motivated to act loyally in order to be rewarded.

In common law judiciaries, becoming a judge is not simply a career choice but rather a 'kind of crowning achievement'[33] achieved relatively later in professional life as a reward for a successful career in another legal profession. That is why these judiciaries are labelled as recognition judiciaries,[34] or judiciaries with a professional model of judicial careers.[35] Judges in this system are thereofre usually trained and socialized outside of the judicial system, and they are more often experts in a particular legal field rather than generalists. Unlike in a bureaucratic model, in recognition judiciaries judges do cannot reasonably expect to be promoted by their superiors, but their career prospects are rather dependent on political support. This makes them in theory more vulnerable to external pressures; which are counterbalanced through other mechanisms, such as life tenure.[36]

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[29] By junior judges I mean, for the purposes of this analysis, positions found for instance in Czechia or Slovakia, which refer to a specific type of apprenticeship during which junior judges spend some time in a different division of the judicial system in order to become familiar with its inner workings. *See* for instance, Kosař, *supra* note 13, at 189, who refers to them as 'judicial candidates', however it may be confusing to use this term in this context.

[30] Court officials with certain judicial powers in German speaking countries or countries influenced by the German legal culture. For instance, CEPEJ reports, *supra* note 7, use this term as well.

[31] *See* for instance: Michal Bobek, *The Fortress of Judicial Independence and the Mental Transition of the Central European Judiciaries*, 14 EUROPEAN PUBLIC LAW 99 (2008).

[32] Gee, *supra* note 25, at 124.

[33] JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA 34 (Stanford University Press, 1990).

[34] E.g.: Garoupa & Ginsburg, *supra* note 26.

[35] Guarnieri & Pederzoli, *supra* note 23; and Gee, *supra* note 25.

[36] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 SOUTHERN CALIFORNIA L.R. 353 (1998).

Theory suggests that bureaucratic judges should be recruited through competitive process, whereas vacancies in recognition judiciaries are filled through executive appointments, where candidate's past achievements help a selector to justify their recruitment to the public. Yet, this distinction has only limited applicability in the real world, as both models often coexist along each other.[37] According to Garoupa and Ginsburg, the choice of a model of judicial careers is determined rather by importance of reputation for a particular position, and not by a legal tradition dominant in any given jurisdiction.[38] Consequently, we can observe trends that are contradictory to expectations raised by the two ideal-types. The lateral entry becomes more common for traditionally bureaucratic judiciaries as an attempt to prevent corporatist tendencies, such as reserved positions for judges socialized outside of the judiciary as it is in France or Spain.[39] An opposite trend can be found in common law countries where judicial recruitment has traditionally been executive prerogative, but judges have become increasingly involved in the process of judicial recruitment;[40] and even promotions are not that uncommon, as e.g. majority of current Justices at the Supreme Court of the United States previously served on lower courts.[41]

II. Differentiating between models of judicial recruitment

The fact that several models of judicial recruitment can occur in a single judiciary makes it particularly difficult to propose a sufficiently complex typology of different recruitment procedures. Even if we limit the scope of such an inquiry only to EU countries we can see a great variance. Indeed, several such attempts can be found. Volcansek focuses on the process through which judges are recruited, and differentiates between the civil service model of judicial recruitment, shared appointment and shared appointment with partisan quotas.[42] In their bi-annual analysis of European judicial systems, the CEPEJ focuses on four

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[37] A similar point can be found in Bell, *supra* note 5, at 17.

[38] Garoupa & Ginsburg, *supra* note 26; or NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY (2015).

[39] Guarnieri, *supra* note 5, at 171. *See* also discussion throughout Part C.

[40] *See* Van Zyl Smit, *supra* note 1; or Jan van Zyl Smit, *'Opening up' Commonwealth Judicial Appointments to Diversity? The Growing Role of Judicial Commissions, in* DEBATING JUDICIAL APPOINTMENTS IN AN AGE OF DIVERSITY 70 (Graham Gee & Erika Rackley eds., 2017). Also, the statement that 81% of Commonwealth countries have some kind of Commission playing a role in the selection of judges can be found in: Graham Gee & Erika Rackley, *Introduction: Diversity and the JAC's First Decade, in* DEBATING JUDICIAL APPOINTMENTS IN AN AGE OF DIVERSITY 1 (Graham Gee & Erika Rackley eds., 2017).

[41] *See* for instance: Denise Lu, Alicia Parlapiano & Karen Yourish, *Kavanaugh Followed the Narrow, Elite Path of Supreme Court Justices* in NEW YORK TIMES, 10 July 2018, available at: https://www.nytimes.com/interactive/2018/07/10/us/politics/supreme-court-path-kavanaugh.html.

[42] *See* Volcansek, *supra* note 21. It needs to be noted that in her analysis Volcansek does not separate ordinary judiciaries from apex and/or constitutional courts.

factors: decisive authorities in the process, the presence or absence of compulsory initial training for judges, the competitiveness of the process, and whether there is an established procedure for other legal professionals.[43] Oberto highlights actors deciding in the process, differentiating between executive nominations, recruitment through public elections, co-option by the judiciary, and through the committee-centered competitive process with the involvement of judges or academics.[44] Finally, Garoupa and Ginsburg focus on the role of judicial councils in the process of recruiting judges.[45] In addition, specifically for common law countries, MacNeill identifies three distinct models which all share nominations by the executive, but differ as regards the body empowered to select judges who are eventually appointed. According to this typology, this power can be exercised by the executive itself, it may require the approval of the legislature, or it can be decided by an independent judicial screening commission.[46]

As can be seen, there are different factors that can be highlighted when one looks at the process of judicial recruitment. When focusing on actors, Oberto's typology perhaps covers all known possibilities from a decisive say of the political branches, through involvement of the judiciary – by itself or through a specialized committee, to the selection of judges by the public. There are still several nuances that can be added. Oberto highlights the role of the executive among political branches, but there were examples when the power of selecting new judges has belonged to the parliament. In Slovenia, the National Assembly makes the final call upon the nomination of the Judicial Council. In Slovakia, until 2002, it was also the parliament that played a crucial role in the appointment of new judges. Importantly, in Czechia, although ministers hold formal powers over judicial appointments, it is court presidents who are perhaps the most crucial gatekeepers.[47] Consequently, it is formally a system with executive appointments, but in fact, it more resembles a system where new judges are co-opted by the judiciary. Furthermore, even when the process is governed by judges, the co-optation can happen in a variety of ways.[48] In France, Spain or Portugal it is judicial schools which effectively control who gets the opportunity to have the training necessary to hold judicial office. In the Netherlands, Slovakia or Poland, the role of gatekeeper is practically vested in judicial councils. Elsewhere, e.g. in Ireland, although

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[43] *See* for instance: CEPEJ, *supra* note 7, at 81-112.

[44] *See* GIACOMO OBERTO, RECRUTEMENT ET FORMATION DES MAGISTRATS EN EUROPE. ETUDE COMPARATIVE 13 (2003) as cited in Bell, *supra* note 5.

[45] Garoupa & Ginsburg, *supra* note 12, at 119-120.

[46] *See* for instance the case of Ireland in JENNIFER CARROLL MACNEILL, THE POLITICS OF JUDICIAL SELECTION IN IRELAND (2016); or Patrick O'Brien, *Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland* (in this special issue).

[47] E.g. Adam Blisa, Tereza Papoušková & Marína Urbániková, *Judicial Self-Government in Czechia: Europe's Black Sheep?* (in this special issue).

[48] *See* the discussion in Part C.

judges formally have a substantial say in the process, the final decision is left to the executive.[49]

There are several reasons why we should pay attention to the processes through which judges are recruited. First, following the logic found in international recommendations, selection of a particular candidate can create certain ties between involved parties, hence threaten the judicial independence. Knowing whether it is the executive, a judicial body, their combination, or any other body can help us identify any potential threats. Second, compulsory training and socialization in the judiciary can ensure imprinting values, beliefs, attitudes, and practices on new judges. On the one hand, this can secure the effective transfer of knowledge from senior to junior members of the judiciary; on the other, it can prevent judiciaries from any new ideas and can protect the survival of habits not conducive to efficient and accountable justice systems. All in all, the ways in which the judges are recruited can have numerous implications on the actual performance of judicial systems.

C. Structure of the process of judicial recruitment

How strong particular actors are in the recruitment process is not simply determined by their involvement in the process, but also by the stage of the process in which they are involved. Despite many differences between models of judicial recruitment, they also share certain features. First and foremost, in the end, the process needs to separate winners and losers – those who are selected and appointed to the judicial office, and those who are not, despite their interest. Every recruitment process involves a number of potential candidates that gradually decreases – through their interaction with the selector – until only one (or possibly few) remain and are eventually appointed. In essence, the process operates as a funnel, as once it starts the number of candidates only reduces, and no one can enter the process from the outside.[50] This analogy aims to help us identify and better understand critical junctions in the recruitment process where selector's preferences determine who remains in the competition for the judicial position, and similarly importantly, who is eliminated.

I propose dividing the process of recruitment into five different stages. First, in order to become a judge, one must meet the prescribed criteria to hold such an office, hence be eligible for a given position. Second, candidates need to be considered for the position by a selector, they need to 'get on the radar,' to be given a chance to compete for the position. Third, candidates need to meet certain criteria – both formal and informal – to be

[49] *See* particularly Part C.III.

[50] A similar analogy was previously used by Volcansek, *supra* note 21, at 364. Volcansek identified three stages of the process: a) certification, which 'derives a person's status in the structure of political opportunity, his opportunity costs, and political socialization;' b) selection, in which candidates and the selecting body interact; and c) role assignment, which gives legitimacy when a candidate formally assumes the office.

shortlisted for the position by the selector. Only afterward does a selector make the final call and selects the best fit candidate for the judicial office. Finally, this person eventually assumes the office through a formal process of appointment. Indeed, not always are these stages easily distinguishable, and at times they even blend, but generally in order to become a judge, one must 'survive' all these critical junctions.

In the following sections, I identify and discuss these stages in four models of judicial recruitment found in Europe. These models were identified on the basis of two factors. The first is the formal openness of competition, i.e. dependency of the participation of any one candidate on the will of the selector. Czechia and Slovenia serve as examples for the 'closed' model of recruitment, as in these countries judges are picked seemingly 'out of thin air' by court presidents, and only afterwards they need to complete a formal process culminating in a successful appointment. Among open and competitive models I identified three distinct paths to the judiciary that can be found in more than one country. France, Spain and Romania serve here as examples for the model with a crucial role played by judicial schools. In the second model, central role is played by judicial councils – along other judicial self-government bodies. Such a model can be found in Slovakia, Poland and the Netherlands. The third model includes a specialized body empowered to select most suitable candidates, e.g. those found in Ireland or the United Kingdom. Indeed, these four models certainly do not exhaust the variations found in Europe, yet they show that commonly found models of judicial recruitment share certain similar features.[51] It needs to be noted, I focus only on primary paths to the judiciary, hence the most common ways of becoming a judge. As was discussed above, it is not uncommon to find several different recruitment models within one judicial system. Possibilities for lateral entry will be therefore discussed rather as a complement to the typical ways in which judges in different jurisdictions are recruited.[52]

[51] For instance, Germany offers a completely different model where the crucial moment separating those who can eventually become judges and those who cannot takes place at state exams at the end of law graduates' university studies. *See* Fabian Wittreck, *Judicial Self-Government in Germany: Resistance and the Roots of Counter-Resistance* (in this special issue); Johannes Riedel, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany, in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE 69 (Giuseppe Di Federico ed., 2005); or Bell, *supra* note 5, at 108-173.

[52] For instance, in France there are numerous ways in which one may enter the judiciary. *See* Roger Errera, *The Recruitment, Training, Career and Accountability of Members of the Judiciary in France* in Di Federico, *supra* note 4 at 49-50; Bell, *supra* note 5, at 52-53.

I. Entering the judiciary through judicial schools

Figure 1. Visualization of the recruitment process

A prototype of a system of recruitment of judges through judicial schools can be found in France, where the *École nationale de la magistrature* (ENM) was founded more than half a century ago.[53] It is based on the idea that the judicial profession is unique and requires specific training. At the same time, by preparing judges for their role in a particular environment it ensures the transfer of beliefs, attitudes and practices that help to build a certain common identity.[54] The typical judicial career in this model starts practically right after the graduation when candidates pass a difficult competitive examination in order to complete a thorough education at the judicial school. Only afterward they can be appointed to a judicial position.

Eligibility criteria in this model are usually rather minimal. Candidates must hold a university degree,[55] be of a certain age and be able to meet other formal criteria, such as holding a particular nationality, having a good moral character, and being physically able to work as a judge. Anyone meeting these prescribed criteria who aspires to work as a judge can apply and be considered for the position. To be accepted in the program, candidates

[53] Antoine Vauchez, *The Ever Protracted Rise of Judicial Self-Government in France* (in this special issue).

[54] Errera, *supra* note 52, at 51-52.

[55] To apply to the French judicial school, ENM, candidates need to have any 4-year university degree in any subject, not necessarily a law degree. *See* Errera, *supra* note 52, at 45.

need to pass a difficult nation-wide examination aimed at thoroughly testing their knowledge and capabilities. The examination consists of written and oral parts. In Spain[56] and Romania,[57] candidates need to pass a test; in France,[58] the written part includes drafting papers on a variety of legal topics covering different branches of law. Oral examinations are also used differently among the analyzed countries. In Spain, the emphasis is placed on hard knowledge, and candidates are expected to "sing" or "recite" their answers.[59] Consequently, such an examination raises a concern that the procedure does not favor those who are intellectually or analytically best fit for the position, but rather candidates who excel at memorizing.[60] In France and in Romania the oral exam is designed to address candidates' motivations, as well as their moral fitness to serve as judges.

Differences can be also found between bodies deciding in the process of admission to the school. Whereas in France it is decided by the Board of the ENM, dominated by the judges,[61] in Romania[62] and Spain[63] this task is conducted by a special admissions board or by tribunals, respectively, both controlled by their respective judicial councils consisting of judicial members with representation from academia, law practitioners, court staff or representatives of the trainees at the school. Passing the examination is a difficult task. In France, it was reported that only about 10% of candidates manage to be successful.[64] In Spain only about 5% of applicants are eventually selected as the preparation takes up to four years and is extremely demanding.[65] Training at the judicial schools also differs between the countries. In Spain, candidates must undergo a 6-month training concerned

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[56] Maria Poblet & Pompeu Casanovas, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Spain* in Johannes Riedel, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany, in* RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE 193 (Giuseppe Di Federico ed., 2005).

[57] Ramona Coman & Cristina Dallara, *Judicial Independence in Romania, in* JUDICIAL INDEPENDENCE IN TRANSITION 835, 848 (Anja Seibert-Fohr ed., 2012).

[58] Errera, *supra* note 52, at 48.

[59] Poblet & Casanovas, *supra* note 56, at 193.

[60] Aida Torres Pérez, *Judicial self-government and judicial independence: the political capture of the General Council of the Judiciary in Spain* (in this special issue).

[61] Errera, *supra* note 52, at 52.

[62] *See* Bianca Selejan-Gutan, *Romania: Perils of a 'Perfect Euro-Model' of Judicial Council* (in this special issue).

[63] Poblet & Casanovas, *supra* note 56, at 194.

[64] Errera, *supra* note 52, at 45.

[65] Poblet & Casanovas, *supra* note 56, at 194.

with theoretical and practical skills, followed by a training period working at a court.[66] In France, candidates for judicial offices go through complex training consisting not only of courses and seminars at the school and 1-year internships at the courts but also of internships with non-judicial institutions and barristers. In Romania, candidates must first complete a 2-year complex training at the school before being appointed by the Romanian judicial council for a 6-year training period to work as 'junior judges' or 'junior prosecutors'.

Even the successful completion of all mandatory training does not secure a judicial position. French as well as Romanian judges first need to pass another examination that, together with their evaluations from their internships or probationary periods, respectively, determine their final ranking. In France, this examination is controlled by an independent panel appointed by the Ministry of Justice,[67] and only few fail to pass it.[68] Afterward, successful candidates are nominated by the French judicial council, first for a 4-month probationary period at a different court in order to be eventually appointed by the president of the country to the judicial office. In Romania, the judicial council also plays a role, as it nominates, in a non-discretionary process, candidates for appointment by the president.[69] In Spain, the appointment powers are vested to the Plenary of the Council, which is argued to pose a risk of arbitrary decision-making based on ideological considerations rather than candidates' abilities.[70]

There seems to be several regularities in the model of judicial recruitment through judicial schools. First, the most important step for a candidate is to successfully pass the entry examination to the judicial school, hence move from being actively considered to a shortlist of candidates actually lucky enough to obtain the necessary training. Second, even though the model has a strong preference for selection based on candidates' capacity and merit, the requirements of the process which is difficult, time-consuming and with uncertain results may favor candidates with certain socio-economic characteristics and not necessarily those best equipped to work as judges. Interestingly, in all three jurisdictions, the majority of judges are women,[71] who may be more willing to endure this uncertainty because of their stronger preference for work-life balance eventually offered by the

[66] Torres-Pérez, *supra* note 60.

[67] Errera, *supra* note 52, at 53.

[68] Errera, *supra* note 52, at 54, Table 2-4.

[69] Coman & Dallara, *supra* note 57, at 850.

[70] Torres-Pérez, *supra* note 60.

[71] As of 2014, the share of women in the judiciary in Romania was at 74%, in France 62% and in Spain 52%. *See* CEPEJ, *supra* note 7.

judicial position.[72] In addition, in France the process led to an over-representation of middle-class candidates,[73] at times with family ties in the judiciary.[74] Third, although judicial councils do not play central roles in these processes, they exercise at least some control over who enters the judiciary. And finally, as the extensive education and socialization among judges provide a fertile ground for the rise of corporatist attitudes, they are sometimes counter-balanced by promoting paths for lateral entry to other legal professionals.[75] In Spain, about 25% of magistrate seats are reserved for lawyers with at least 10 years of experience;[76] in France the education at the ENM is open to civil servants, those who served as elected members of local councils, as well as those with a doctorate in law or research and teaching experience at the university.[77]

II. Recruitment controlled by judicial self-government bodies

The model of judicial recruitment where the crucial role is played by bodies of judicial self-government often shares similarities with the model with the central role of the judicial school. Often these procedures are competitive, as they are in Slovakia or the Netherlands; often they come with mandatory training at a specific institution, as it is in Poland or the Netherlands. Though, it needs to be noted, the access to mandatory training is controlled not by judicial schools nor any national authority, but rather to judicial self-government bodies on the level of individual courts. In addition, decisions made at a non-national level are later reviewed by judicial councils which effectively serve as crucial gatekeepers.

In the three countries analyzed in this section, the eligibility criteria slightly differ. Slovakia has the simplest rules. Candidates for judicial office need to be 30 years old, meet the usual criteria such as nationality and clear police records, need to have a law degree and have passed an exam authorizing them to exercise the legal profession.[78] Poland and the

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[72] E.g. Madlena Duarte, Paula Fernando, Conceiçãcao Gomes & Ana Oliveira, *The Feminization of the Judiciary in Portugal: Dilemmas and Paradoxes*, 10 UTRECHT LAW REVIEW 29 (2014).

[73] For France *see* Doris Marie Provine & Antoine Garapon, *The Selection of Judges in France: Searching for a New Legitimacy, in* Malleson & Russell, *supra* note 5. For Spain *see* for instance: Bell, *supra* note 5, at 190, where candidates from less prosperous regions with fewer professional opportunities were also particularly over-represented.

[74] Bell, *supra* note 5, at 53.

[75] In France, entering the judiciary right after university remains the most common path, however there have been efforts to promote alternative paths. *See* Antoine Garapon & Harold Epineuse, *Judicial Independence in France*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 273, 281 (Anja Seibert-Fohr ed., 2012).

[76] Poblet & Casanovas, *supra* note 56, at 195.

[77] Errera, *supra* note 52, at 47-48.

[78] For the purpose of participation in the judicial selection procedure, judicial, advocate's, prosecutor's or notary exam all count as equal.

Netherlands adds to the criteria the requirement related to previous professional training. Polish judges need to be at least 29 years old, have a law degree, plus, they need to have completed a traineeship at the judicial school and/or served as probationary judges for at least 3 years. Recruitment from the positions of probationary judges has recently been the most common path to judicial office.[79] In the Netherlands, the first phase of a judge's career very much resembles careers in systems with judicial schools. After graduation, candidates apply to serve as a 'judicial public servant in training',[80] they need to pass a test on intelligence, a psychological examination and an oral exam with the National Selection Committee, which consists of 22 members appointed by the Dutch judicial council.[81] Reports suggest the process may be skewed in favor of candidates with particular characteristics, as minority candidates have greater problems to pass the written exams.[82] Candidates who manage to pass need then to complete a 6-year training consisting of 38 months of training at the court, 10 months of in-depth education at the Training and Study Center for the Judiciary (SSR), followed by a 2-year internship outside of the judiciary.[83]

To be considered for a judicial position, candidates need to apply to the process. In both Poland and the Netherlands judges apply directly to the court where there is a vacant position. In Poland, the court president administering applications passes them to the college of the court for the assessment of their qualifications. Subsequently, the list of candidates is considered by the assembly of the court, which takes a vote and hence creates a shortlist of possible candidates. In the Netherlands, candidates are interviewed by judges of the court to determine whether candidates fit in the organization.[84] After that, the management of the court, possibly with advice from the court's assembly, prepares a ranked list of 3 candidates for appointment, which is sent to the judicial council.

In Slovakia, until 2017, candidates similarly applied directly to courts. As this practice was on the one hand rather slow, leaving courts with vacant positions for a considerable amount of time, and on the other produced results that favored candidates who previously served at particular courts,[85] these rules were changed. Since then, selection procedures

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[79] *See* Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Governement in Poland: On Judicial Reform Reversing Transition* (in this special issue).

[80] Philip M. Langbroek, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in the Netherlands* in Di Federico, *supra* note 5, at 164.

[81] *See* Elaine Mak, *Judicial Self-Government in the Netherlands: Demarcating Autonomy* (in this special issue).

[82] Roel De Lange, *Judicial Independence in the Netherlands, in* JUDICIAL INDEPENDENCE IN TRANSITION 231, 243 (Anja Seibert-Fohr ed., 2012).

[83] Langbroek, *supra* note 80, at 168.

[84] *Id.* at 168.

[85] SAMUEL SPÁČ, BY THE JUDGES, FOR THE JUDGES: THE STUDY OF JUDICIAL SELECTION IN SLOVAKIA (Dissertation Thesis, Comenius University, 2017).

are administered at the level of second-instance courts, are held once a year, and are intended to fill all expected vacancies in the region.[86] Five-member committees appointed by the president of the Slovak judicial council are in charge of the selection. They consist of two members nominated by the judicial council, two members nominated by the Minister of Justice, and one member elected by the college of presidents of councils of judges in the given region. The procedure consists of a series of written exercises, psychological evaluation and the interview with the committee, which decides about its content. In order to pass all the requirements, candidates need to score at least 60% in each phase of the process. The final ranking of the candidates is then created by totaling the grades from all phases of the procedure.[87]

In the final stages of these processes in all three countries, successful candidates are considered by judicial councils, which nominate them for appointment to the executive branch. The Dutch council receives a ranked list of three candidates and passes it to the government which appoints the highest ranked candidate. In Poland and Slovakia, although councils interfere with the nomination process rather rarely, there have been some controversies.[88] In addition, both the Polish and the Slovak council consider security screenings prepared by the executive branch checking for candidates' 'immaculate character.'[89] The appointment process in both countries has seen some controversies. In 2014, Slovak President Andrej Kiska initially refused to appoint a candidate because of concerns about the fairness of the selection procedure and asked the council to reconsider. Yet, when the council nominated the candidate again, Kiska appointed her to office.[90] Unlike in Slovakia, Polish presidents have managed to refuse the appointment of nominated judges despite the will of the council. In 2008, President Lech Kaczynski refused to appoint 10 judges without any justification;[91] and the same happened in 2016 when President Andrzej Duda refused to appoint another 10 candidates.[92] As neither council can actually overrule president's decision, the observed difference cannot be easily explained by different institutional setting and is rather a consequence of different factors.

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[86] There are eight regional courts in Slovakia. In each of the regions there are five to eight district courts.

[87] For more detailed description of all phases *see* Spáč, *supra* note 85, at 92-94.

[88] For more *see* Samuel Spáč, *Kariérny postup na vyššie súdy: pod kontrolou predsedov súdov*, in NEDOTKNUTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993-2015 121 (Erik Láštic & Samuel Spáč eds., 2017); Adam Bodnar & Lukasz Bojarski, *Judicial Independence in Poland, in* JUDICIAL INDEPENDENCE IN TRANSITION 667, 686 (Anja Seibert-Fohr ed., 2012).

[89] For more *see* Erik Láštic and Samuel Spáč, *Slovakia / Slovaquie* in 26 EUROPEAN REVIEW OF PUBLIC LAW 1201 (2014); or Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Government in Slovakia* (in this special issue); and Bodnar & Bojarski, *supra* note 88, at 679-680.

[90] For more *see* Spáč, *supra* note 85, at 94.

[91] For more *see* Bodnar & Bojarski, *supra* note 88, at 687, 690-693; Śledzińska-Simon, *supra* note 79.

[92] *See* Sledzinska-Simon, *supra* note 79.

The systems of judicial recruitment analyzed in this section share several features. Most importantly, the process of selection involves three actors. First, there is a selection procedure at a non-national level, either at individual courts or at the regional level, as it is in Slovakia. Second, a shortlist of successful candidates is passed to the judicial council, which rarely interfere. Finally, the appointment rests in the hands of the executive intervening in the process only sporadically, leaving the major responsibility at the non-national level. As a consequence, even though all analyzed systems offer possibilities of lateral entry, they seem to be rather marginal. In Poland, it was estimated that only 15-20% of new judges come from outside of the judiciary,[93] and judicial recruitment practices in Slovakia also showed a strong preference for candidates socialized in the system.[94]

III. Recruitment of judges through specialized bodies

The introduction of specialized bodies empowered to recruit judges in the United Kingdom and Ireland may be one of the strongest indicators of the rise of judicial self-governance in Europe and around the world. Ireland created its Judicial Appointments Advisory Board (JAAB) in 1995. It consists of 11 members, six of whom are judges, securing a narrow judicial majority in the body.[95] The UK's Judicial Appointments Commission (JAC)[96] started functioning a decade later, in 2006. It consists of 15 members of whom only six are judges, and only eight all together are lawyers. Additionally, not only are judges in the minority, the JAC is chaired by one of its lay members. Importantly, despite seeming similarity, the two bodies serve considerably different roles, which may be traced to rationales of their respective establishments. The Irish JAAB was 'not a product of policy preferences, but rather a reaction to political crisis'[97] spurred by a political disagreement over appointments of two senior judges causing the reform to fail to diminish political control over the process of judicial recruitment. In the UK, the executive gave up its powers on the basis of genuine

[93] *See* Sledzinska-Simon, *supra* note 79.

[94] Spáč, *supra* note 85.

[95] For composition *see* MacNeill, *supra* note 46.

[96] When refering only to the Judicial Appointments Commission responsible for appointments in England and Wales, I purposefuly omit the Northern Ireland Judicial Appointments Commission (NIJAC) and the Judicial Appointments Board for Scotland (JABS) that fulfill the same task in other parts of the UK. Also, it needs to be noted that the JAC is responsible only for appointments to the Court of Appeal and High Court, while the appointments to the UK Supreme Court happen in a different regime. *See* van Zyl Smit, *supra* note 1, at 206-207.

[97] MacNeill, *supra* note 46, at 88.

belief that weakening of the political influence[98] would help to improve the judiciary and increase diversity of the judicial bench.[99]

The introduction of specialized bodies fundamentally altered the process of judicial recruitment in both countries. Judges in the UK were in the past selected through such nontransparent procedures that even the persons being considered for judicial positions did not know they were being talked about.[100] Currently, to get on selector's radar in the UK, candidates need to apply and demonstrate their interests in working in the judiciary. As both countries are still recognition judiciaries, eligibility criteria are considerably higher than in continental Europe. Candidates in Ireland must be practicing lawyers for at least 10 years,[101] in the UK it is required to have at least 5 or 7 years of professional experience in the legal field.[102]

After the application the crucial stages of the recruitment process are administered by these specialized bodies, however their respective roles differ. While in Ireland the JAAB only prepares a shortlist of candidates and the actual selection rests in the hands of political actors, the JAC operating in England and Wales is in fact responsible for picking those who are appointed. The Irish JAAB assesses candidates' general suitability on the basis of their applications, including information regarding their education, qualifications, and professional experiences. It then presents a list of the seven candidates it perceives to be fit for the office to the Minister of Justice. In the past, the body played a rather passive role, serving more as a screening body than a genuine gatekeeper, presenting not only seven candidates but all those who were not deemed 'suitable.'[103] Recently the body has started to play a more substantive role, recommending fewer candidates for the judicial office,[104] or even none, as was reported to have happened on one occasion in 2016.[105] In the UK, after the application the JAC sifts candidates based of their provided self-assessments, as well as on two reference letters focusing on their professional, personal or judicial qualifications. For larger selection procedures, candidates may also need to take a

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[98] Although the process was perceived as de-politicized and merit-based, political considerations seemed to matter. *See* Chris Hanretty, *The Appointment of Judges By Ministers: Political Preferment in England, 1880-2005* in 3 JOURNAL OF LAW AND COURTS 305 (2015).

[99] *See* van Zyl Smit, *supra* note 1, at 14.

[100] For more on these practices *see* van Zyl Smit, *supra* note 1, at 13.

[101] For more information *see* https://aji.ie/the-judiciary/appointment-to-judicial-office/.

[102] For more information *see* https://www.judicialappointments.gov.uk/eligibility-legally-qualified-candidates.

[103] MacNeill, *supra* note 46, at 89, 127-128.

[104] MacNeill, *supra* note 46, at 98.

[105] *See* O'Brien, *supra* note 46.

qualifying test and have a telephone interview. Those who successfully get 'shortlisted' are invited for a 'Selection Day' consisting of an interview with a 3-member committee examining the candidates' performance in hypothetical scenarios or role plays.[106]

The selection of judges in the UK from the shortlist of candidates is determined in consultation with the person who previously held the vacant position or with someone who is considered to have 'other relevant experience'.[107] Final decisions are made by the Selection and Character Committee, which consists of JAC members who take into account all the accumulated assessments before selecting one candidate for each vacancy. Interestingly, since 2013, in case of a tie between two or more candidates in terms of merit, the JAC should select a candidate to enhance the diversity of the judicial bench. [108] In Ireland, the final selection does not happen in the specialized body, but as aforementioned it is the Minister who, after a discussion with the Attorney General and the Prime Minister (Taoiseach), presents the selected name to the Cabinet for formal approval. Although the government is not obliged to select any candidate from the list, it usually does so. When in 1998 the government wanted to appoint a candidate that the JAAB deemed unsuitable, members of the JAAB threatened to resign, effectively protecting the significance of the body in the process of recruiting judges.[109] The appointment rests in the hands of political bodies – in Ireland judges are eventually appointed by the President, in the UK by the Lord Chancellor, who can reject a recommendation and as the JAC to reconsider, but must provide written reasons for such action.

In summary, judicial recruitment through specialized bodies have managed to curtail traditional political influence over the process and have allowed judicial actors to effectively control entrance to the judiciary. Nevertheless, in Ireland the merit principle seems to be undermined by the fact that greater chances of success in the process have candidates who are known by crucial decision-makers.[110] In addition, the reformed processes have so far failed to curb other traditional biases or create more diverse and representative benches. As of 2014 only about 30% of judges in both judiciaries were female.[111] Also, reports confirm that in the UK the same applies to ethnic or racial

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[106] For more information about the process *see* https://www.judicialappointments.gov.uk/overview-selection-process.

[107] For more information *see* https://www.judicialappointments.gov.uk/statutory-consultation.

[108] For more *see* https://www.judicialappointments.gov.uk/equal-merit-provision.

[109] O'Brien, *supra* note 46.

[110] MacNeill, *supra* note 46, at 151.

[111] CEPEJ, *supra* note 7, at 101.

minorities,[112] urging some scholars to call for quotas to balance the bias favoring candidates from dominant identity groups.[113]

IV. Recruiting judges out of sight

In Czechia and Slovenia, the process of judicial recruitment is much less visible and less structured than in the previously described cases. Paradoxically, this eventually serves for the benefit of judicial self-governance bodies, because it is court presidents who are the most crucial actors in the process. This happens because the political bodies – the president in Czechia and the parliament in Slovenia – who are empowered to appoint judges traditionally act more as notaries confirming decisions made elsewhere than as actual gatekeepers. Consequently, as crucial decisions are made out of sight, to obtain a proper understanding of these recruitment processes it may be necessary to have access to information about their informal parts. Otherwise, it may be impossible to identify candidates considered for the job, as well as to recognize how they are eventually selected.

The eligibility criteria in both countries described in this section are fairly similar. Candidates need to have obtained a law degree, must be 30 years of age and must meet some common criteria, such as nationality or 'good character.' Slovenian judges additionally need to have at least 3 years of professional experience in law,[114] while Czech judges need to have passed a special judicial exam or the equivalent.[115] In the following stages, it is the court presidents who are the most important actors. In Slovenia, court presidents make a preliminary reasoned selection of candidates, which they submit to the Judicial Council. The criteria that judges use to draw up a shortlist or determine who the candidates are seem to be hidden from the public eye.[116] Czech court presidents also enjoy a great amount of discretion in the process. There are no national criteria for the selection procedures, hence they may differ from one court to another. At some courts it seems that court presidents hand-pick new judges, elsewhere court presidents have opted for selection procedures based on tests conducted by the Judicial Academy.[117]

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[112] *See* https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf.

[113] Malleson, *supra* note 7, at 281.

[114] Cristina Dallara, *Judicial Reforms in Transition: Legacies of the past and dominant political actors in post-communist countries,* 1 IRSIG-CNR WORKING PAPER 10 (2007).

[115] For the purpose of consideration for a judicial position, candidates can have passed exams authorizing them to work in different legal professions, such as advocates, notaries or executors.

[116] *See* Matej Avbelj, *Contextual Analysis of Judicial Governance in Slovenia* (in this special issue).

[117] Blisa, Papoušková & Urbániková, *supra* note 47.

The process of appointment is also fairly similar in both countries. In Czechia, the minister formally nominates candidates for judicial offices on behalf of the government but does so upon request from the court president. Eventually, judges are appointed by the president of the country. Slovenian judges are nominated for their offices by the judicial council, which does so based on criteria adopted together with the Ministry of Justice. Appointment rests in the hands of the parliament, which usually confirms proposed candidates without any substantive discussion. This suggests 'a certain balance' between the judicial and the political body.[118] Although, there have been few instances reported when the National Assembly declined to appoint proposed candidates despite criticism from experts and the general public, in at least one of these cases the unsuccessful candidate had served as an attorney, and hence aimed to enter the judiciary from the outside.[119]

In summary, in this model judicial self-governance bodies seem to enjoy considerable discretion despite the fact that formal powers belong to politicians. Because the recruitment process happens in a rather nontransparent way, judicial bodies can greatly benefit from the information asymmetry they have vis-à-vis political bodies. The model provides a fertile ground for favoritism and selection based on criteria other than merit, as court presidents serve as de facto unrestrained gatekeepers. Whether they opt to concentrate such powers in their own hands, or whether they employ competitive procedures or make their decisions in consultation with other judges of the court is largely dependent on their will. The same applies to the openness of the judiciary to legal professionals working in other fields. In both countries, eligibility criteria suggest there is an option of recruiting judges laterally, however the actual openness is once again dependent on individual actors. Based on this, it can be reasonably hypothesized that candidates working in the judiciary as law clerks or 'junior judges' may have greater chances of being appointed, hence the crucial moment in judges' careers may happen at earlier stages of their careers – when they are recruited for junior positions, or when they are taking the required judicial exam.[120] Paradoxically, the Slovenian example also shows that politicians may at times protect the judiciary from outsiders, even when the judiciary itself proposes such a candidate.

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[118] Cristina Dallara, *Smoother Judicial Reforms in Slovenia and Croatia: Does the Legacy of the Past Matter?, in* DEMOCRACY AND JUDICIAL REFORMS IN SOUTH-EAST EUROPE: BETWEEN THE EU AND THE LEGACIES OF THE PAST 31, 39 (Cristina Dallara ed., 2014).

[119] Dallara, *supra* note 118, at 38-39; Avbelj, *supra* note 116.

[120] For more on 'junior judges' and their chances to become judges in the Czech system *see* Kosař, *supra* note 13, at 189.

D. Analyzing judicial recruitment: taking actors and their motivations into account

The discussion in the previous Part showed that different systems tend to favor different candidates. While the recruitment through judicial schools leads to over-representation of women and middle-class candidates, models where a crucial role is played by judicial self-government bodies at non-national level tend to favor those with ties in the given environment. Traditional recognition judiciaries have, on the other hand, suffered from being elitist and unrepresentative of their societies. The particular composition of the judicial bench is a consequence of the interplay between motivations of selectors (who they search for), and candidates (who seek a judicial job) in the context of a specific institutional design (who decides in what stage and how much discretion they enjoy).

I argued that judicial recruitment operates as a funnel where the number of candidates gradually decreases until only one (or few) remain in the competition and are eventually appointed to the judicial office. This process has several critical junctions – eligibility, active consideration, shortlisting, selection and appointment – which effectively shape the outcome of the judicial recruitment process. Because of that it is important to look beyond institutions and the legal framework and take into consideration the motivations of involved actors. For instance, if eligibility criteria invite candidates from other legal professions, yet their chances of 'surviving' the competition would be considerably small, as they may not meet the informal criteria set out by a selector, a fairly small number of candidates for lateral entry may be misunderstood as a lack of interest of such candidates for judicial positions. Similarly, participation in the recruitment process may be too costly for certain groups of candidates causing over-representation of particular parts of the society on the judicial bench. In addition, even if the process of recruitment was a perfect rank-order tournament in which candidate compete against one another,[121] their chances may be skewed because selection criteria may hold latent bias favoring some groups of candidates at the expense of others, incorrectly suggesting differences between them while disregarding possible benefits of a more diverse judiciary.

In an ideal case, and in line with the merit-principle emphasized in 'soft law' standards, an output of the recruitment process should be a result of a 'concern for correctly ascertaining the competence.'[122] In general, at each of the critical junctions, candidates need to persuade selecting bodies they are better fit than their competitors to perform the judicial function. Yet, competence may be only one of the many considerations selectors

[121] E.g. Hanretty, *supra* note 98; Stephen Choi & Mitu Gulati, *A Tournament of Judges?* In 92 CALIFORNIA L.R. 299 (2004); Jordi Blanes I. Vidal & Clare Leaver, *Are Tenured Judges Insulated from Political Pressure?* In 95 JOURNAL OF PUBLIC ECONOMICS 570 (2011); or Martin R. Schneider, *Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts*, 20 EUROPEAN JOURNAL OF LAW AND ECONOMICS 127 (2005).

[122] Karen J. Alter, *Agents or Trustees? International Courts in their Political Context* in 14 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 33, 42 (2008).

make. To put it differently, selectors always have some preferences, from normatively desirable through those less legitimate to possibly latent ones. Selectors may pay attention to candidates' ideological positioning[123] in order to secure certain political influence over the courts;[124] or they can pursue other objectives such as diversity and representativeness of the bench,[125] particularistic interests,[126] or partisan considerations.[127]

The assumption that selectors always have motivations is particularly important for a proper understanding of how judicial recruitment works in the age of judicial self-government.[128] Whether recruiting powers belong to political branches or the judiciary, the process in which selectors equip new judges with considerable powers establishes a certain connection between them.[129] There are several reasons why the danger of transferring these powers to the hands of judges should not be underestimated. Judges, just like any other group of actors, can have shared interests which can be translated into the composition of the judiciary. Indeed, they are not inevitably harmful – they may be based on reasonable, even virtuous, expectations about the role of the judiciary. Nevertheless, there is a substantial amount of evidence suggesting that actors within judiciaries may prove to be as dangerous as political actors, although their interests may

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[123] E.g. Hanretty, *supra* note 98; Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002).

[124] *See* particularly 'government control regime' in Rachel E. Bowen, *Judicial Autonomy in Central America: A Typological Approach* in 66 POLITICAL RESEARCH QUARTERLY 831 (2013). For current developments in Central Europe *see* Adam Bodnar, *Europe can save Poland from darkness* in POLITICO, 9 April 2018, available at: https://www.politico.eu/article/poland-judiciary-rule-of-law-europe-must-intervene/; David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law* in 10 HAGUE JOURNAL ON THE RULE OF LAW 83 (2018); or Bojan Bugaric & Tom Ginsburg, *The Assault on Postcommunist Courts* in 27 JOURNAL OF DEMOCRACY 69 (2016). For other parts of world *see* Raul A. Sanchez-Urribarri, *The Politicization of Latin American Judiciary via Informal Connections, in* LEGITIMACY, DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED 307 (David K. Linnan, ed., 2012); Fombad, *supra* note 2; Alexander Stroh, *Consequences of Appointment Policies for Court Legitimacy in Benin: A Network Analysis Approach*, 281 GIGA WORKING PAPER (2016); or Voeten, *supra* note 3.

[125] E.g. Malleson, *supra* note 1; Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and their Application to a Commission-Based Selection System* in 34 FORDHAM URBAN L.J. 125 (2007).

[126] Spáč, Šipulová & Urbániková, *supra* note 89.

[127] *See* Simone Benvenuti & David Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model* (in this special issue); Başak Çalı & Betül Dürmuş, *Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey* (in this special issue).

[128] Kosař, *supra* note 12.

[129] Such relationships can be framed within Principal-Agent theory. *See* Voeten, *supra* note 3. Although for the study of judges some authors recommend rather the idea of ‚trustees' as they are entrusted with power and have freedom to act autonomously on behalf of the principal. *See* Alter, *supra* note 122, at 38-44.

manifest in different ways.[130] Importantly, if the power to recruit judges belongs predominantly to the judges themselves, the inherent information asymmetry between them, political branches and the general public, may easily give rise to particularistic interests.

Although it is selectors who shape the process the most, their choices are bound by the pool of candidates from which they are choosing future judges. To reasonably identify who is actually interested in judicial positions, researchers could greatly benefit from high levels of transparency that would allow them to learn about their characteristics in order to properly analyze them.[131] In addition, to understand who even gets to the pool of candidates, it is important to pay attention to motivations of prospective judges to seek a judicial position. Building on Posner,[132] I believe that in order for an individual to seek a judicial position, the utility of being a judge must outweigh the utility of working in another legal profession, and they must understand the costs of participating in the recruitment process as being reasonable and subjectively bearable, while also perceiving a reasonable chance to succeed in the process.

As for the utility of being a judge, candidates consider expected time devoted to judging, and time devoted to other activities. The reasonable balance between the two, which the work in the judiciary seems to offer, is particularly important to female judges who prefer to have enough time for their families more often than men.[133] Reputation and income stemming from the judicial position may be among other factors determining one's willingness to become a judge. Indeed, perceived and expected enjoyment of a particular

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[130] E.g. J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan* in 13 THE JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 259 (1997); Ramseyer & Rasmusen, *supra* note 22; David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: , in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 37 (Peter H. Russell & David M. O'Brien eds., 2001); Bobek & Kosař, *supra* note 16; Kosař, *supra* note 13; Bogdan Iancu, *Perils of Sloganised Constitutional Concepts. Notably that of 'Judicial Independence'*, 13 EUROPEAN CONSTITUTIONAL L.R. 582 (2017); Coman & Dallara, *supra* note 57; Lukasz Bojarski & Werner Stemker Köster, *The Slovak judiciary: its current state and challenges* (Open Society Foundation 2012); Maria Popova, *Be Careful What You Wish For: A Cautionary Tale of Post-Communist Judicial Empowerment*, 18 DEMOKRATIZATSIYA 56 (2010); Maria Popova, *Why Doesn't the Bulgarian Judiciary Prosecute Corruption?*, 59 PROBLEMS OF POST-COMMUNISM 35 (2012); Lydia F. Müller, *Judicial Administration in Eastern Countries*, *in* JUDICIAL INDEPENDENCE IN TRANSITION 937 (Anja Seibert-Fohr ed., 2012).

[131] Several authors studied judicial selection using statistical analyses, e.g.: Vidal & Leaver, *supra* note 121; Hanretty, *supra* note 98; Spáč, *supra* note 85. Another possibility is employing network analytcal approach, for an overview *see* Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh, *The Informal Dimension of Judicial Politics,* 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 413 (2017).

[132] Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),* 3 SUPREME COURT ECONOMIC REVIEW 1, 31-39(1993).

[133] E.g. Duarte et al., *supra* note 72; or Matej Uhlík & Samuel Spáč, *Príčiny a dôsledky nadreprezentácie žien v slovenskom súdnictve, in* NEDOTKNUTEĽNÍ? POLITIKA SUDCOVSKÝCH KARIÉR NA SLOVENSKU V ROKOCH 1993-2015 (Erik Láštic & Samuel Spáč eds., 2017).

job would probably be a part of the consideration of any prospective candidate, as well as, for instance a feeling of personal contribution to the well-being of society or even the idea of 'justice.' Although, candidates may not only by motivated by virtue, but also can seek fulfilment of their personal interests, such as being able to exert influence in particular cases or even benefiting from participation in a system of corruption.[134] As regards the costs of participation in the recruitment process, prospective judges may consider the time and energy necessary to ensure a reasonable chance for success in the process. For instance, if in Spain it is known that preparation for entry exams takes couple of years and is extremely demanding, it can easily discourage large number of potential candidates. Similarly, if prospective judges in Slovakia know that to succeed they need connections in the judicial system, it may prevent them from even seeking active consideration. Last but not least, as Alemanno warns with regard to CJEU and ECtHR, the transparency of the process may pose a threat to the integrity of candidates who might be subject to public scrutiny and can actually hurt their reputation.[135]

All in all, the recruitment process is not a perfect competition where only the best fit for the office succeed. It is rather a consequence of the interplay between motivations and interests of selectors and potential candidates for the judicial office in the context of a particular institutional design. Recruitment process translates into the composition of the bench, which in turn affects how the judiciary is performing. Taking these motivations into consideration hence may be in fact as important for the study of the judicial recruitment and its effects on the actual performance of the judiciary as is identifying crucial gatekeepers and critical junctions shaping the process.

E. Conclusion

The rise of judicial self-governance is clearly visible when it comes to the recruitment of new judges in Europe. This can be stated with confidence, not only with regard to the countries analyzed in this paper, but even in cases that were omitted here.[136] Transferring these powers into the hands of judges seems to be a cure for a variety of diseases. In Ireland, a greater involvement of judges in judicial recruitment was a response to a political

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[134] E.g. Daniel J. Beers, *Understanding Corruption in the Post-Communist Courts: Attitudinal Data from Romania and Czech Republic* (11th Annual International Researchers Conference "Post-Communist Corruption: Causes, Manifestations, Consequences 2012).

[135] Alberto Alemanno, *How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection, in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 202 (Michal Bobek ed., 2015).

[136] *See* contributions on different jurisdictions in this issue, particularly Germany. Although it is rarely considered an example of strong judicial self-governance, even there judges play a substantive role in the recruitment of their colleagues: *see* Wittreck, *supra* note 51.

crisis.[137] In Slovakia, such a change occurred due to the unsatisfactory performance of the old model much similar to that found currently in Czechia.[138] In the UK, the transfer of power was a consequence of a genuine desire for a better model supported by concerns for legitimacy,[139] and in Romania it was a part of larger reforms towards greater judicial self-governance.[140] Either way, judges seem to have more power than ever in recruiting their colleagues and successors.

International documents have called for the greater involvement of judges as a tool for ensuring recruitment based on merit, which is intended to result in candidates' increased capacity to properly perform their judicial functions. Nonetheless, this plan seems to have several shortcomings. First and foremost, there is no unified conception of what it is to be a good judge, or what makes one judge better than another, and hence it is practically impossible to evaluate whether a merit-oriented process delivers what it promises.[141] Even if we allow that a judicial recruitment process controlled by judges delivers the best possible judges, there are many examples that undermine this assumption. As was discussed in the paper, merit-oriented processes tend to favor specific identity groups at the expense of others, as happens in France,[142] the Netherlands[143] and the UK,[144] or they can be skewed towards candidates with stronger connections to the judiciary, as was the case in Slovakia.[145] These examples suggest that no matter how the process of judicial recruitment is designed, it is shaped by the actors involved in it, and the outcome – the selection and appointment of judges – reflects their preferences, whether they are virtuous or driven by self-interest.

This is why there is a need for deeper study of how judicial recruitment models affect the composition of the bench. As was stated throughout the paper, judges play an indisputable role throughout the European systems of judicial recruitment. Although attention is usually paid to the formal rules and bodies, as well as the actors and institutions interacting in the process, other factors may be more significant for our deep understanding of the

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[137] MacNeill, *supra* note 46, at 38-47, 88.

[138] Spáč, *supra* note 85.

[139] E.g. Van Zyl Smit, *supra* note 1.

[140] E.g. Selejan-Gutan, *supra* note 62; or Parau, *supra* note 13.

[141] Dimino, *supra* note 6, at 819. For different approaches to the quality of judges *see* also: JASON E. WHITEHEAD, JUDGING THE JUDGES: VALUES AND THE RULE OF LAW (2014).

[142] Provine & Garapon, *supra* note 73.

[143] De Lange, *supra* note 82, at 243.

[144] E.g. Malleson, *supra* note 1; or Malleson, *supra* note 7.

[145] Spáč, *supra* note 85.

recruitment of judges. In the paper, I proposed five stages in which candidates for judicial office may be eliminated until one or a few remain and are eventually appointed. Potential candidates must first and foremost be willing to bear the costs of the ambition to become a judge, which at times involves intensive preparation, as it does in Spain, where years of study are required, as well as possibly useful connections in the judicial system.[146] Then candidates need to meet the eligibility criteria for the position, get on the selector's radar to be actively considered, pass the selector's requirements to get on the shortlist, and eventually be selected and appointed. What matters more than whether judges play a role in the process, or through which body, is how other powers utilize their checks and balances and in which stages of the process. Arguably, the Irish JAAB enjoys considerably less control over who becomes a judge than the Czech court presidents do, even though the formal powers belong to the Czech political elites. Similarly, political actors in the UK and in Slovakia do not seem to contradict decisions made by the bodies of judicial self-governance, while similarly empowered political actors in Poland and in Slovenia have successfully constrained the discretion of judicial bodies. All in all, scholarly attention should not only focus on whether judges are involved in judicial recruitment, but rather at what stage and with what interests, as well as on how their powers are balanced by other actors, and how it all translates into the composition and performance of different judicial systems.

[146] Poblet & Casanovas, *supra* note 56, at 161.

Articles

Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?

By Marína Urbániková[*] & Katarína Šipulová[**]

Abstract

Judicial councils are often presented as a panacea for many disorders of judicial systems, including low public confidence in the judiciary. Nevertheless, the assessment of their impact has so far been neglected. The article offers a unique view on the relationship between judicial councils and the level of public confidence in courts. It draws a novel conceptual map of factors influencing public confidence in the judiciary, stressing its complex and multifaceted character. Situating the judicial councils on the map, it explores how they can help to potentially increase the level of public confidence in the judiciary, and assesses to what extent this has been true in the countries that have adopted them. The results reveal a considerable gap between the promises, expectations, and practice, and raise doubts about the ability of judicial councils to enhance confidence in courts. Judicial councils rarely manage to substantially improve institutional performance: they can enhance the quality of judicial systems which have already functioned quite well, but they do not tend to bring about change in the judicial systems that have been previously significantly flawed. The analysis of the longitudinal Eurobarometer data showed that, on average, the EU countries without judicial councils are better off in terms of public confidence. Although the existence of judicial councils does not make a difference regarding public confidence in the judiciary in the new EU member states, in the old EU member states, judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them.

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A. Introduction

Since 1989, Europe has witnessed a boom of judicial councils, i.e. institutions which transferred various decision-making powers regarding judicial self-government from politicians to judges and political nominees. This wave built on diverse motives: some countries hoped to foster the efficiency and efficacy of judicial systems, while others believed that judicial councils would help enhance the independence, accountability, or legitimacy of domestic courts. All in all, the judicial councils were believed to enhance the working of the courts and, depending on their success, enhance public confidence in the judiciary, as well. Despite judicial councils being eventually established in most European countries, we know in fact very little about how they have performed. Following various case studies presented in this Special Issue, this article zeroes in on judicial councils as a possible determinant of public confidence in the judiciary.

Surprisingly, although public confidence is frequently identified as one of the goals of judicial councils, legal scholarship has so far largely neglected this phenomenon. Having the confidence of the public is of fundamental importance for the judiciary. Public confidence links ordinary citizens to the institutions that are intended to serve them. The public perception that courts provide basic protections to individuals and serve as independent and impartial tribunals to resolve disputes is essential for the effective performance of the judicial function. If the citizens do not trust the courts, they may not accept judicial decisions and may resort to other means to resolve their disputes. Thus, without public confidence in the judiciary, its ability to provide justice is compromised, which can have far-reaching consequences for the rule of law, stability of democracy, and social order. Moreover, the perception of the quality of the judicial system has lately gained significance, since it can determine the transnational activities of citizens and enterprises.

The vital significance of public confidence in judges, courts, and the judiciary is widely acknowledged by various stakeholders on both the national and international levels. For instance, ethical codes of judicial conduct usually state that judges are supposed to maintain public confidence and should not do anything that would undermine it (for example, the Preamble of Bangalore Principles of Judicial Conduct states that public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society).[1] Furthermore, public confidence is one of the indicators commonly used for the assessment of judiciaries (e.g.,

[1] See also Bangalore Principles of Judicial Conduct of 2002, value 4 identifying the judges as a subject of constant public scrutiny; references to public confidence and the role of judges appear also in several national codes of conduct, e.g. General Council of the Judiciary (Spain). *Principles of Judicial Ethics*, 16 December 2016; United States Courts. *Code of Conduct for United States Judges*, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

in CEPEJ reports[2] or European Commission reports).[3] Sustaining or enhancing public confidence in the judiciary is one of the goals declared by top judicial officials[4] and often finds its place in new strategies, plans, reforms, and policies focusing on the judiciary across the globe.[5] Although rather indirectly, references to public confidence can also be traced in the reasoning justifying the rise of the power of judges in court governance, which has been one of the most important and remarkable recent trends in the administration of judiciary.[6]

The establishment of judicial councils[7] as a panacea for deficiencies of judicial systems has been strongly promoted by many international organizations. Both the Council of Europe (CoE) and the European Union (EU) typically conditioned the successful accession of countries with the institutional transformation of judiciaries and the establishment of judicial councils as a model form of judicial self-government.[8] The argumentation substantiating the transfer of powers from politicians to judges was clear: establishing a judicial council was expected to strengthen the independence of the judiciary, and thus lead to a better working judicial system. The judicial councils were expected to be independent authorities, typically rooted in constitutions, overseeing the independence of courts and judges from political influence, while at the same time, guaranteeing their accountability,[9] as well as the effectiveness[10] and transparency of judicial systems, and fostering the rule of law principles. Consequently, this improvement should also be felt by

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[2] E.g. *Report of CEPEJ on European Judicial Systems (2016)*. https://www.uihj.com/en/publication-of-the-2016-report-of-cepej-on-european-judicial-systems_2165915.html.

[3] European Commission. *Effective justice*. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice_en.

[4] E.g. Committee for the Evaluation of the Modernisation of the Dutch Judiciary (2006). *Judiciary is Quality.* https://www.rechtspraak.nl/SiteCollectionDocuments/Judiciary-is-quality.pdf.

[5] E.g. United States Courts. *Enhancing Public Understanding, Trust, and Confidence.* http://www.uscourts.gov/statistics-reports/issue-7-enhancing-public-understanding-trust-and-confidence. Or Public Service and Trust Commission (2008). Strategic Plan for the Judicial Branch. https://www.jud.ct.gov/Committees/pst/StrategicPlan.pdf.

[6] Kosař, David, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Government in* Europe in this issue.

[7] For a definition of a judicial council, see Kosař, *id*.

[8] *Resolution of the General Assembly of the European Network of Councils for the judiciary* (2008), Budapest, 21-23 May, 2008; The European Network of Councils for the Judiciary (ENCJ): *Council for the Judiciary Report 2010/2011*. ENJC Project Team; Recommendation No. R (94) 12, Committee of Ministers.

[9] Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,* 44 *ASCL* 605 (1996); PETER H. RUSSELL AND DAVID M. O'BRIEN, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY (2001).

[10] *Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Committee of Ministers*, 17 November 2010, para. 46.

the users of the judicial system, i.e., by the general public, and thus be reflected in an increasing level of public confidence in the judiciary.

Given the high hopes regarding the establishment of judicial councils, the question then arises as to what extent they have been fulfilled. However, the literature on this topic is scarce,[11] and systemic analysis of the relationship between the confidence in courts and judicial councils is still missing.[12] Few existing studies focus predominantly on the relationship between judicial conduct and public confidence,[13] let alone other possibly intervening factors.

Acknowledging the crucial importance of public confidence in the judiciary, this article explores both the potential and factual consequences of the establishment of judicial councils in this aspect. It aims to assess how judicial councils can enhance the level of public confidence in the judiciary, and to what extent this has been true in the countries that have adopted them. In order to do so, we created a novel concept map of public confidence that categorizes the main factors identified by existing research as potentially influential, and pinpoints the position of judicial councils among the determinants adding to public confidence at the institutional, individual, and cultural level. Based on national case studies presented in this Special Issue, complemented by longitudinal comparative Eurobarometer data, we argue that 1) citizens of both old and new EU member states have greater confidence in the judiciary than other branches of power, irrespective of the existence of judicial councils, 2) EU countries without judicial councils enjoy higher levels of public confidence in their judiciaries, and 3) while the existence of judicial councils does not make a substantive difference in the new EU countries, in the old EU member states they coincide with even lower levels of public confidence in the judiciary.

The paper proceeds as follows: Section B starts with an examination of expectations regarding the establishment of judicial councils, with a special focus on public confidence. It surveys both official documents and scientific literature and shows, although indirectly, that one of the rationales for the introduction of judicial councils has been the expected increase of public confidence. Section C defines public confidence, explains its importance, summarizes the main theories explaining how it emerges, and reviews empirical studies

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[11] Argument raised e.g. by Nuno Garoupa & Tom Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, 57 *Am. J. of Comp. Law* 103 (2009).

[12] For some exemption see e.g. US or common law scholarship: Sara C. Benesh, *Understanding Public Confidence in American Courts*, THE JOURNAL OF POLITICS 697 (2006). Sarah M. R. Cravens, *Promoting Public Confidence in the Regulation of Judicial Conduct: A Survey of Recent Developments and Practices in Four Common Law Countries*, 42 MCGEORGE LAW REVIEW 177–212 (2011).

[13] Cravens, *supra* note 12; Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 THE AMERICAN POLITICAL SCIENCE REVIEW 1209–1226 (1986), http://www.jstor.org/stable/1960864; Benesh Sara C., *supra* note 12.

focusing on the determinants of public confidence in the judiciary. Section D explores both theoretical and empirical links between the establishment of judicial councils and the level of public confidence. First, it investigates the mechanism on the theoretical level. Second, based on the national case studies in this Special Issue, it reviews the extent to which judicial councils in ten[14] countries fulfilled the expectations that were invested into them. Then, based on Eurobarometer data, it examines whether the judiciaries in the countries which have established judicial councils enjoy greater public confidence. Finally, the conclusion summarizes the main findings, offers tentative interpretations of these findings, reflects on the methodological limitations and suggests avenues for future research.

B. Rationales Surrounding the Establishment of Judicial Councils: Did Public Confidence Matter?

Post-war Europe restarted processes of judicial reform in nearly all transitioning democracies. The introduced changes mostly mirrored the general distrust towards concentrating power in the hands of one actor.[15] Constitutional courts[16] and judicial councils symbolized the new institutions of democratic regimes,[17] helping to rid the courts and judges of the political inference by the executive power.[18] The following section aims to analyze the expectations put on the establishment of judicial councils regarding their impact on the public's confidence in the judiciary. The section looks at both primary national and international level documents and explores the presence of explicit, direct references on the enhancement of public confidence. It is important to stress that while this section identifies only explicit notions, empirical Section D also confronts these notions with expectations identified by the authors of individual case studies in this Special Issue.

I. International Reports

International documents, recommendations, and statutes only gradually began to reflect the relevance of the model of judicial self-government (JSG) for the public confidence in courts. The very first notion emerged in Bangalore Principles of Judicial Conduct of 2002.[19]

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[14] France, Ireland, Italy, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Turkey.

[15] HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2004).

[16] Shortly after the WW2, constitutional courts were introduced in Austria, Germany, Italy, Greece, Spain, Portugal, Belgium, and France. Similar development followed after 1989 in post-communist countries.

[17] ODIHR. *Judicial Independence in Eastern Europe, South Caucasus and Central Asia. Challenges, Reforms, and Way Forward. Meeting Report*, 23-25 June 2010, https://www.osce.org/odihr/71178?download=true.

[18] Some authors however pointed out the risk of establishing judicial councils in countries which did not purify and screen the post-communist judiciaries. DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016).

[19] THE BANGALORE PRINCIPLES, 2002, *supra* note 1, at 11.

The United Nations Judicial Group on Strengthening Judicial Integrity, which prepared the Principles later revised at the Round Table Meeting of Chief Justices in The Hague in 2002, strongly believed that judicial accountability and judicial independence would lead to a rise in the level of public confidence (in the rule of law).[20] The Principles also identified different levels of confidence in the courts' activity, depending on the adequate information about the judiciary and its functions being available to citizens.[21]

Similarly, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus, and Central Asia[22] stressed the effect of administration on the facilitation of public trust in the courts, especially through establishing the court positions of press secretary or media officers.

The Council of Europe, very active in recommendations on JSG in post-communist Central and Eastern European countries, did not reflect on the question of public confidence in its 1994 Recommendation.[23] Nevertheless, the restoration of public confidence emerged later on in objectives and action plans meaning to strengthen judicial independence and impartiality.[24] The reference to the rise of public confidence as one of the effects of judicial councils later appeared in reports of the Venice Commission.[25] The European Commission, on the contrary, identifies national justice systems as a key to restoring confidence, and the structural justice reforms (while advocating judicial councils) as an essential tool for effectiveness of national justice systems.[26]

Lastly, in 2017, the European Network of Judicial Councils adopted a report on public confidence, stressing that judicial councils, "in order to maintain the rule of law, must do all they can to ensure the maintenance of an open and transparent system of justice. Equally, an open and transparent system of justice is a further precondition for establishing

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[20] *Commentary on Bangalore Principles* https://rm.coe.int/168066d6b9.

[21] *Id*.

[22] OSCE and Max Planck Minerva Research Group on Judicial Independence. *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia,* https://www.osce.org/odihr/KyivRec?download=true.

[23] Council of Europe, Committee of Ministers, Recommendation No. R (94) 12 (1994) http://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanunteklifi/recR(94)12e.pdf.

[24] Council of Europe Portal, https://www.coe.int/en/web/human-rights-rule-of-law/-/council-of-europe-launches-action-plan-on-strengthening-judicial-independence-and-impartiality and Council of Europe, *Plan of Action on Strengthening Judicial Independence and Impartiality* CM(2016)36 https://rm.coe.int/1680700125.

[25] Venice Commission. Judicial Appointments. Discussion paper, 14 March 2007, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD(2007)001-e.

[26] European Commission. https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/improving-effectiveness-national-justice-systems_en.

and maintaining the Public trust in justice, which is a cornerstone of legitimacy of judiciary."[27] The report identified several tools judicial councils could use to enhance public confidence.

In other words, international associations expected that judicial councils might enhance public confidence, but only gradually. Most international documents merely pointed to significant drops in public confidence in individual judiciaries or the importance of public confidence for the state and society as such. Still, the rise in confidence is implicitly expected to come with the creation of a more efficient judiciary – a task that was newly assigned to the judicial councils.

II. National reports

National reports, on the other hand, often indicate a pressing need for judicial system reform, which stems from a lack in public confidence. What these reports lack, however, is a clear understanding of why confidence is low or how the proposed changes would help to increase it. In general, references to public confidence in the judiciary appear at two stages: as a justification for either the establishment or the reform of a judicial council. In both instances, official domestic documents expected the judicial councils to either actively respond to lowering public confidence or they stressed the need to build and promote public confidence. Similarly to international documents, the rationale is only indirect: the potential success of judicial councils in strengthening the effectiveness, independence, accountability (etc.) of judiciaries should result in higher public confidence in the courts.

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[27] European Network of Councils for the Judiciary. *Public Confidence and the Image of Justice. Report 2017-2018*. https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Reports/ENCJ_Report_Public_Confidence_2017_2018%20adopted_%20GA_1_June_2018.pdf.

Table 1: Values acknowledged in national reports as conditioning the rise of public confidence, as identified in national reforms of judicial councils (Source: authors)

	Independence	**Accountability**	**Effectiveness**
Establishment	Netherlands[28]	Netherlands[29]	Netherlands[30]
			Belgium[31]
Reforms			France[32]
	Italy[33]		
	Ireland[34]		Ireland[35]
	Hungary[36]		
	Poland[37]		Poland[38]
			Belgium[39]

[28] Philip M. Langbroek, *Reform of the Judiciary in the Netherlands. Some Lessons after the First 8 Years.* World Bank Group, http://siteresources.worldbank.org/INTECA/Resources/ReformJudiciaryNetherlands.pdf.

[29] *Id.*

[30] Philip M. Langbroek, *Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence*. IJCA:2 (April 2010).

[31] Le Conseil de la Justice, http://www.hrj.be/fr/content/historique.

[32] Conseil Superieur de la Magistrature, http://www.conseil-superieur-magistrature.fr/le-csm/histoire-et-patrimoine.

[33] *La tutela dell'onore professionale e della dignità personale dei magistrati. L'esigenza di garantire il rispetto della funzione giudiziaria.* Resolution of the CSM,15 December 1999; Renato Balduzzi, *Inauguration of the Judicial Year 2015.* 24 January 2015, https://www.csm.it/web/rbalduzzi/bacheca-del-consigliere/-/blogs/inaugurazione-dell-anno-giudiziario-2015; Consiglio Superiore della Magistratura, https://www.csm.it/web/csm-internet/assistenza-al-cittadino.

[34] It is worth noting that focus on public confidence appears only in the new 2017 proposal. Department of Justice and Equality, *Judicial Council Bill 2017* http://www.justice.ie/en/JELR/Judicial_Council_Bill_2017_Explanatory_and_Financial_Memorandum.pdf/Files/Judicial_Council_Bill_2017_Explanatory_and_Financial_Memorandum.pdf

[35] *Id.*

[36] IBAHRI. Still under threat: The independence of the judiciary and the rule of law in Hungary, 2015.

[37] https://www.premier.gov.pl/files/files/white_paper_en_full.pdf.

[38] *Id.*

[39] Le Conseil de la Justice, http://www.hrj.be/fr/content/communique-de-presse-le-conseil-superieur-de-la-justice-10-ans-apres-la-marche-blanche. The Belgian High Council of Justice. Presentation, http://www.hrj.be/sites/default/files/press_publications/o0026b.pdf.

As already mentioned, national legal reforms of judicial councils usually relate public confidence to some other value (Table 1); most frequently these are independence (Netherlands, Poland, Italy, Hungary, Ireland), accountability (Netherlands), and the perception of the effectiveness of judicial system (Netherlands, Poland, Hungary, France, Ireland). Perhaps the most illustrative is the Dutch example, where the extensive research on the effectiveness of various JSG forms in other countries,[40] as well as public confidence polls, preceded the establishment of the Council for the Judiciary. All in all, references to public confidence appear as one of the rationales justifying the establishment of a judicial council mostly after 1989, in countries introducing judicial councils in the last 10-15 years.

This section examined the expectations that both international and domestic reforms laid on judicial councils in relation to public confidence. In most of the cases, the legislative documents justified the reform or establishment of judicial councils by a need to increase the independence, legitimacy, or overall effectiveness of the courts. Public confidence had a certain place in these justifications, as both national and international rationales expected that the success of judicial councils in fulfilling the above-mentioned aims would translate into higher public confidence in the judiciary.

C. Public Confidence in the Judiciary: Definition, Foundations, and Determinants

As suggested above, judicial councils are often presented as a panacea for many disorders of the judicial system, from low judicial independence to ineffective and inefficient court management. They are expected to improve the quality of judicial systems, which should consequently be reflected in increased public confidence in the judiciary. However, public confidence is a multifaceted phenomenon, with plenty of various intervening factors and determinants that need to be taken into account. To examine the possible links with judicial councils, we first start with a comprehensive literature review and theoretical considerations about public confidence. This section offers a working definition of public confidence in the judiciary (Part I.), summarizes the main theories explaining how it emerges (Part II.) and, based on previous empirical research, examines its main determinants (Part III.).

I. Defining Public Confidence in the Judiciary

Questions regarding the trust and public confidence in political institutions, including the judiciary, have long been of interest for scholars in social sciences. As suggested by Sztompka[41], there are some unique features of contemporary societies that give particular salience to this topic. We live in a complex and interdependent world with increasingly

[40] *See supra* note 4.

[41] PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 11-15 (2000).

numerous options to choose from, which, moreover, is becoming more and more opaque for us. Our existence and well-being progressively depend on people and institutions which are growingly anonymous and impersonal. Thus, to cope with these challenges, to be able to cooperate, and to not become paralyzed by uncertainty, we need to have enough trust in other people, as well as institutions. Trust and confidence are the social cement binding interpersonal relationships in society and encouraging sociability and participation. In this regard, public confidence in the judiciary is especially important, because courts and judges are the guarantors of justice to whom we resort in cases when our trust in other people or institutions fails us.

As is usually the case with broad concepts used across various disciplines, there is considerable disagreement on the definition of trust and confidence. First, these two concepts are very often used as synonyms, although sociology traditionally differentiates between them. In this respect, Luhmann[42] distinguishes *confidence*, which refers to living with everyday dangers without being actively involved and considering alternatives[43], and *trust*, which requires a previous engagement and presupposes a situation of risk where a trusting agent must accept responsibility for potential disappointment. From this point of view, when thinking about the general attitude of citizens towards the judiciary, usually measured in public opinion polls, it seems more appropriate to refer to confidence, as the vast majority of people do not have direct, first-hand experience with courts. Their relationship is more "detached, distanced, noncommittal".[44] The term *trust in the judiciary* should be reserved for situations in which people need to participate actively and face an unknown future,[45] for instance, to choose whether to trust and turn to the court with their issue, or rather try to settle it on their own or via extrajudicial proceedings. It must be noted, however, that in practice, the majority of literature on public confidence in the judiciary seems not to distinguish between trust and confidence. Similarly, official international documents on JSG, as shown in Section B, use the terms interchangeably. Moreover, some studies use trust and public confidence in the judiciary as the main indicator of other concepts, like public support,[46] esteem,[47] or social legitimacy.[48]

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[42] Niklas Luhmann, *Familiarity, Confidence, Trust: Problems and Alternatives*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 94–107 (Diego Gambetta ed., 1988).

[43] *E.g.,* normally, we are confident that when we leave our homes in the morning and go to work, there will not be a commando of snipers trying to shoot us down. Although it is possible, we bracket this option because it is highly improbable, and also because otherwise we would have to live in a state of permanent uncertainty.

[44] Sztompka, *supra* note 41, at 25.

[45] *Id.* at 25.

[46] *E.g.,* Jeffery J Mondak & Shannon Smithey Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 THE JOURNAL OF POLITICS 1114–1142 (1997).

[47] *E.g.,* Caldeira, *supra* note 13.

Public confidence in the judiciary can be defined as positive expectations regarding the conduct of judges and courts.[49] People have confidence in actors or institutions when they believe they will act "as they should".[50] It is the public's belief in the reliability, honesty and ability of courts and judges, the belief that the courts "act competently in the sense that they are able to perform the functions that are legally or constitutionally assigned to them".[51] The conceptualization of the *lack* of public confidence in the judiciary is of equal importance. It does not necessarily invoke a negative mirror-image of confidence - cynicism, and alienation - but it can merely reflect ''skepticism, an unwillingness to presume that political authorities should be given the benefit of the doubt''.[52] Thus, when citizens claim in a public opinion poll that they do not have much or any confidence in the judiciary in their country, it does not necessarily mean that they consider the courts to be unfair, corrupt and incompetent. It can also mean that they are rather skeptical and suspicious and do not see enough reasons why they should grant them confidence. In practice, to be able to differentiate between the two groups and assess their size, we would need further and more detailed poll questions, which are usually missing.

From the time perspective, the level of public confidence reflects both *short-term* satisfaction with the performance of courts and judges (which can vary depending on, e.g. agreement with salient and important judicial decisions, or occurrence of ad hoc affairs and scandals), and *long-term* attachments and loyalty, which can cushion the impact of short-term dissatisfactions.[53] Therefore, when examining the potential effect of judicial councils on public confidence in the judiciary, we will use longitudinal data to account for temporary increases and decreases.

From the viewpoint of targets of trust, Sztompka distinguishes between *interpersonal trust/confidence* in other actors with whom we come into direct contact (e.g., the judge who is handling our case), and its derivative, *social trust/confidence* towards more abstract

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[48] *E.g.,* Marc Bühlmann & Ruth Kunz, *Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems, 34* WEST EUROPEAN POLITICS 318 (2011).

[49] Roy J. Lewicki, Daniel J. McAllister & Robert J. Bies, *Trust and Distrust: New Relationships and Realities*, 23 ACADEMY OF MANAGEMENT REVIEW 439 (1998).

[50] Jack Citrin & Christopher Muste, *Trust in Government, in* MEASURES OF POLITICAL ATTITUDES 465-532 (John Robinson, Phillip R. Shaver & Lawrence S. Wrightsman eds, 1999).

[51] George W. Dougherty, Stefanie A. Lindquist & Mark D. Bradbury, *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary,* 38 STATE AND LOCAL GOVERNMENT REVIEW 176 (2006).

[52] Timothy E. Cook & Paul Gronke, *The Skeptical American: Revisiting the Meanings of Trust in Government and Confidence in Institutions*, 67 THE JOURNAL OF POLITICS 785 (2005).

[53] James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AMERICAN JOURNAL OF POLITICAL SCIENCE 364 (2003).

social objects, like social groups (e.g., judges as a professional group), institutions and organizations (e.g., courts), their practices (e.g., judicial procedures), or, at the most general level, social systems or regimes (e.g., the judicial system as a whole).[54] Therefore, when examining the possible effects of judicial councils on the level of public confidence, we are using the broadest possible indicator – *public confidence in the judiciary* – to account for potential spillovers of confidence on various levels.

II. Foundations of Public Confidence in the Judiciary

Before investigating the mechanism of how judicial councils could enhance the level of public confidence in the judiciary, we first need to explore the foundations of confidence and its main determinants, and to place the factor of our interest – effects of judicial councils – within this context. After several decades of theorizing confidence, there are a plethora of theories aiming to explain how it is born, enhanced, maintained or lost. Based on these theoretical assumptions and expectations, how does public confidence in the judiciary emerge, what are its main sources and determinants, and what is the position of the factor of our interest – judicial councils – within this context?

There are two competing views of the main source of both trust and confidence.[55] According to the first one, it is a default expectation of other individuals' goodwill based on *individual dispositions* (innate or learned early in life) to trust. Some people are inherently more optimistic and less worried that others will let them down, and even after potential disappointment, they try again. On the contrary, according to the *relational view* of trust and confidence, it is mostly a property of a social relation between two or more actors which "results from information about and past experience with the trustee and the situation at hand and is a prediction about another person's behavior"[56]. We argue that these two mechanisms are not mutually exclusive, but in practice, they are both involved, albeit to a varying extent. The tendency to place confidence in other people and institutions, including the judiciary, is an individual disposition, but as such, it is also culturally co-determined (on a collective level, long-term negative experiences and failed expectations of the political institution can be culturally reproduced and can instill a lack of public confidence in future generations). Moreover, this disposition is permanently confronted with everyday experiences, and it works as a prism through which we evaluate empirical evidence from everyday life and decide whether to change the dis/trusting attitude or not.

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[54] Sztompka, *supra* note 41, at 41-46.

[55] ERIC M. USLANER, THE MORAL FOUNDATIONS OF TRUST (2002).

[56] Sven Oskarsson, Torsten Svensson & PerOla Oberg, *Power, Trust, and Institutional Constraints: Individual Level Evidence,* 21 RATIONALITY AND SOCIETY 173 (2009).

Sztompka distinguishes three main grounds for trust and confidence: reflected trustworthiness (primary trust), contextual cues (secondary trust), and trust culture.[57] From this perspective, public confidence in the judiciary is determined mainly by the perceived trustworthiness of the courts and judges, which is influenced not only by their performance, but also by their reputation (the record of past deeds), and appearance. To estimate the trustworthiness of the judiciary, the public needs some knowledge and information: courts and judges need to be transparent and visible enough, subordinated to unambiguous criteria and standards of performance, and citizens should have some competence to evaluate the cues of trustworthiness. The second determining set of factors relates to external context, e.g., accountability (presence of agencies enforcing the trustworthiness). Finally, the third ground for public confidence in the judiciary is rooted in the broader cultural context, in collective memory, and in shared values, norms and expectations.

All of these views, albeit to a different extent, are reflected in the three main theoretical traditions competing as an explanation for the origins of public confidence in institutions. First, *social-psychological theories* treat trust and confidence as basic aspects of personality types, which emerge in the first stages of psychological development.[58] This view sees confidence in the judiciary at least to some extent as a given personality trait. Second, *cultural theories* hypothesize that confidence originates in long-standing and deep-seated beliefs about people that are the products of social experiences and socialization, and thus also have roots in cultural norms.[59] Institutional confidence is an extension of interpersonal trust projected onto political institutions. According to these theories, public confidence in the judiciary is at least to some extent culturally determined and should differ between culturally distinct countries. Third, *institutional theories* emphasize institutional performance (the expected utility of institutions performing satisfactorily) instead.[60] Based on these theories, public confidence in the judiciary is determined by its performance, which can include for instance efficiency, access, effectiveness, competence, equality, or fairness. Again, we see these theories as complementary rather than mutually exclusive. The three levels – individual, institutional and cultural – form the conceptual framework within which we examine the effects of judicial councils on public confidence.

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[57] Sztompka, *supra* note 41, at 69-101.

[58] Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture or Performance?, in* DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? 56 (Susan J. Pharr & Robert D. Putnam eds., 2000).

[59] William Mishler & Richard Rose, *What Are the Origins of Political Trust? Testing Institutional and Cultural Theories in Post-communist Societies,* 34 COMPARATIVE POLITICAL STUDIES 30-62 (2001).

[60] Newton & Norris, *supra* note 58, at 58.

III. Determinants of Public Confidence in the Judiciary: Review of Empirical Evidence

Inasmuch as judicial councils can influence the functioning of courts, their existence (or lack thereof) and character naturally have a place among factors potentially influencing the level of public confidence in the judiciary. To evaluate their effect, we first need to ascertain other possible determinants. Based on the review of empirical studies on public confidence in political institutions in general, as well as in the judiciary in particular, we identified the main factors with statistically significant influence on confidence, and divided them into the three above-mentioned levels: individual traits, cultural characteristics, and factors related to institutional performance of state and judiciary.

On the individual level, almost all the empirical analyses confirm the existence of a relationship between various individual characteristics of citizens and the level of their confidence in the judiciary, although the evidence is very often conflicting. This is hardly surprising, given that the studies draw from different datasets from different countries collected in different time periods. Socio-demographic characteristics are among the most commonly explored variables. Numerous studies[61] concluded that respondents with higher *income and economic status* have greater institutional confidence. Regarding the level of *education*, several US studies[62] concluded that more educated respondents have more confidence in courts, while in selected Eastern European countries, education and institutional confidence was found to be negatively associated,[63] and in other studies, education was a non-significant predictor.[64] From the viewpoint of *gender*, according to some studies, women seem to have more confidence than men,[65] although there are also analyses concluding the opposite.[66] The same applies to *age*: most of the reviewed

[61] *E.g.,* Bühlmann & Kunz, *supra* note 48, at 332. Newton & Norris, *supra* note 58, at 9. William Mishler & Richard Rose, *Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies*, 59 THE JOURNAL OF POLITICS 444 (1997). Ola Listhaug, *Confidence in Institutions: Findings from the Norwegian Values,* 27 ACTA SOCIOLOGICA 121 (1984). James W. Stoutenborough & Donald P. Haider-Markel, *Public Confidence in the U.S. Supreme Court: A New Look at the Impact of Court Decisions*, 45 THE SOCIAL SCIENCE JOURNAL 38 (2008). Ryan Salzman & Adam Ramsey, *Judging the Judiciary: Understanding Public Confidence in Latin American Courts,* 55 LATIN AMERICAN POLITICS 88 (2013).

[62] *E.g.,* Stoutenborough & Haider-Markel, *supra* note 61. Benesh, *supra* note 12. James P. Wenzel, Shaun Bowler & David J. Lanoue, *The Sources Of Public Confidence In State Courts: Experience and Institutions,* 31 AMERICAN POLITICS RESEARCH 200 (2003).

[63] *E.g.,* Kadri Lühiste, *Explaining Trust in Political Institutions: Some Illustrations from the Baltic States*, 39 COMMUNIST AND POST-COMMUNIST STUDIES 493 (2006).

[64] *E.g.,* Bühlmann & Kunz, *supra* note 48, at 332. Mishler & Rose, *supra* note 61, at 445.

[65] *E.g.,* Lühiste, *supra* note 63. Bühlmann & Kunz, *supra* note 48, at 332. Newton & Norris, *supra* note 58, at 9. Mishler & Rose, *supra* note 61, at 445. Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government,* 60 POLITICAL RESEARCH QUARTERLY 717 (2007).

[66] *E.g.,* Stoutenborough & Haider-Markel, *supra* note 61.

studies[67] claimed that older citizens exhibit higher confidence in institutions, but some found that it was vice versa,[68] and another[69] discovered no relationship between the two. Regarding *ethnicity*, the majority of the reviewed studies[70] concluded that members of ethnic minorities have less confidence in political institutions, including the judiciary. On the contrary, according to another US study,[71] Latinos have more positive dispositions towards the courts than their fellow citizens.

Besides socio-demographic characteristics, the *direct and indirect experience* of citizens may also be important. Interestingly, several studies reported a negative relationship between personal experiences with the court system (being a defendant in a criminal case or a party to a civil proceeding) and its evaluation: as experience increases, support decreases.[72] The only exception seems to be the experience of being a criminal juror in the US, which increases the level of confidence in the judiciary.[73] Again, another study found no statistically significant relationship between experience with the courts and level of confidence in the judiciary.[74] In addition, *awareness and knowledge* of the judiciary matter, although the results are once more conflicting: according to several US studies,[75] more knowledgeable respondents are more supportive of courts, but an analysis focusing on Latin-American countries[76] found an opposite relationship. The majority of citizens use the media as their main source of information about the judiciary; in this respect, several studies revealed that *media consumption* is positively associated with confidence in legal

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[67] *E.g.,* Mishler & Rose, *supra* note 61, at 445. Newton & Norris, *supra* note 58, at 9. Kelleher & Wolak, *supra* note 65, at 717. Listhaug, *supra* note 61.

[68] *E.g.,* Stoutenborough & Haider-Markel, *supra* note 61. Lühiste, *supra* note 63, at 486.

[69] Bühlmann & Kunz, *supra* note 48, at 332.

[70] *E.g.,* Lühiste, *supra* note 63, at 491. Kelleher & Wolak, *supra* note 65. Dougherty, Lindquist & Bradbury, *supra* note 50. David B. Rottman & Alan Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges,* 36 COURT REVIEW: THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION 24-31 (1999).

[71] Wenzel, Bowler & Lanoue, *supra* note 62, at 202.

[72] *E.g.,* Benesh, *supra* note 12, at 704. Wenzel, Bowler & Lanoue, *supra* note 62, at 204. Thomas E. Fossati & James W. Meeker, *Evaluations of Institutional Legitimacy and Court System Fairness: A study of gender differences*, 25 JOURNAL OF CRIMINAL JUSTICE 152 (1997).

[73] *E.g.,* Wenzel, Bowler & Lanoue, *supra* note 62, at 206.

[74] Salzman & Ramsey, *supra* note 61, at 89.

[75] *E.g.,* Wenzel, Bowler & Lanoue, *supra* note 62, at 202. Benesh, *supra* note 12, at 704. James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts,* 92 AMERICAN POLITICAL SCIENCE REVIEW 350 (1998).

[76] Salzman & Ramsey, *supra* note 61, at 88-89.

authorities.[77] *Political attitudes* matter as well: people with more centrist views (supporting neither the extreme left nor right),[78] with a stronger orientation towards liberty[79] and social order,[80] who support the rule of law and democracy,[81] have higher confidence in the judiciary. On the contrary, those with a greater preference for a stronger president exhibit less confidence.[82] Finally, unsurprisingly, *political winners*, i.e., individuals supporting the party which is currently in power, display higher levels of institutional confidence.[83]

Furthermore, still on the individual level, perception, and evaluation of the current economic situation, as well as of institutional performance (including the judiciary), have significant effects on public confidence. First, the better an individual perceives the *economic conditions* and the more optimistic she is about the future of the national economy, the stronger is her confidence in political institutions, including the judiciary.[84] Second*, evaluation of the performance of political institutions* also plays a role. As shown by Mishler and Rose,[85] in post-communist countries, people who think that the new regime has increased freedom and treats them more fairly than the old regime are much more likely to trust current political institutions, including the judiciary. In addition, several studies found a strong negative correlation between the level of perceived corruption and experience with corruption on the one hand, and the level of public confidence in political institutions on the other.[86] Third, *evaluation of the court system's performance* matters, mostly regarding perceived fairness and agreement with court rulings. Several authors argue that the public does not evaluate the courts by focusing primarily on either performance or instrumental issues such as delays or costs, but instead, what matters is

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[77] *E.g.,* Kelleher & Wolak, *supra* note 65. Yingyos Leechaianan, Seksan Khruakham & Larry T. Hoover, *Public Confidence in Thailand's Legal Authorities*, 14 INTERNATIONAL JOURNAL OF POLICE SCIENCE & MANAGEMENT 246-263 (2012).

[78] *E.g.,* Listhaug, *supra* note 61.

[79] *E.g.,* Stoutenborough & Haider-Markel, *supra* note 61. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AMERICAN JOURNAL OF POLITICAL SCIENCE 658 (1992).

[80] *E.g.,* Caldeira & Gibson, *supra* note 79.

[81] *E.g.,* Salzman & Ramsey, *supra* note 61, at 87.

[82] *E.g.,* Salzman & Ramsey, *supra* note 61.

[83] *E.g.,* Bühlmann & Kunz, *supra* note 48, at 332. Lühiste, *supra* note 63, at 491.

[84] *E.g.,* Lühiste, *supra* note 63. Mishler & Rose, *supra* note 61, at 442.

[85] Mishler & Rose, *supra* note 61, at 441.

[86] *E.g.,* Salzman & Ramsey, *supra* note 61, at 87. Kelleher & Wolak, *supra* note 67, at 718. Lühiste, *supra* note 63. Mishler & Rose, *supra* note 61, at 48. Bianca Clausen, Aart Kraay & Zsolt Nyiri, *Corruption and Confidence in Public Institutions: Evidence from a Global Survey*, 25 WORLD BANK ECONOMIC REVIEW 232 (2011).

their perception of how the courts and judges treat the public, how fair the procedures are, and how the courts exercise their authority.[87] Additionally, transparency and media coverage matter: if specific rulings reach the public on a larger scale, they can have a significant positive or negative impact on individual-level confidence in the courts. Disagreement with decisions (or at least with how they are interpreted) reduces confidence, while pleasing decisions increase it.[88]

Public confidence in the judiciary is also influenced by the amount of *interpersonal trust and confidence* (the tendency to trust other people). From the viewpoint of theories explaining the emergence of confidence, interpersonal trust and confidence are located on the borders between the individual and cultural levels. As already mentioned, it is to some extent a personal trait which is inborn and developed in early childhood, and to some extent, it is also culturally determined. According to cultural theories, interpersonal confidence is an attribute of national character, and it spills over to political institutions, and thus co-determines institutional trust. Several studies found that people and societies with relatively high levels of interpersonal trust and confidence tend to also have relatively high levels of confidence towards political institutions, including the judiciary.[89] Nonetheless, Mishler and Rose[90] found that in post-communist countries, this relationship is weak, and, surprisingly, negative.

Besides interpersonal confidence, another potential source of confidence in the judiciary is *overall institutional confidence*. It can be conceptualized as a cross-sectional determinant, because it partially stems from individual traits, from cultural norms, expectations, and beliefs, and also from the performance of the institutions and how it is perceived. Empirical studies focusing on various countries agree that overall confidence in political institutions, particularly national government and parliament, significantly correlates with confidence in the judiciary.[91]

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[87] *E.g.,* Fossati & Meeker, *supra* note 72. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?,* 19 BEHAVIORAL SCIENCES AND THE LAW 233 (2001).

[88] *E.g.,* Stoutenborough & Haider-Markel, *supra* note 61, at 41. Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court,* 51 POLITICAL RESEARCH QUARTERLY 651-652 (2016).

[89] *E.g.,* Lühiste, *supra* note 63. Newton & Norris, *supra* note 60, at 63. Kenneth Newton, *Trust, Social Capital, Civil Society, and Democracy,* 22 INTERNATIONAL POLITICAL SCIENCE REVIEW 211 (2001).

[90] Mishler & Rose, *supra* note 59, at 46.

[91] *E.g.,* Wenzel, Bowler & Lanoue, *supra* note 62, at 202. Salzman & Ramsey, *supra* note 61, at 87. Bühlmann & Kunz, *supra* note 48, at 332. Benesh, *supra* note 12, at 704. Stoutenborough & Haider-Markel, *supra* note 61, at 41. Magali Rheault & Bob Tortora, *Confidence in Institutions: Africans Speak on the Meaning of Being Well Governed,* 32 HARVARD INTERNATIONAL REVIEW 74 (2011).

On the cultural level, it must be noted that people in post-communist countries tend to have less confidence in other people and political institutions. Markova suggests that the lack of trust and confidence is a product of previous oppression and totalitarian socialization which fostered feelings of fear and suspicion.[92] Sztompka argues that communist societies developed a "bloc culture" with various traits and characteristics leading to the decay of trust.[93] Moreover, trust and confidence can be eroded by dramatic and negatively perceived societal changes,[94] such as transformation. The pains of the transformation process with its radical political, economic, and societal changes led to a "post-revolutionary malaise'' and "the morning after syndrome'', and with that to a further collapse of trust and confidence.[95] Thus, to summarize, the Communist regime eroded trust in the state and its institutions, including courts and judges. The judicial profession suffered from low prestige (both in social and financial terms)[96] and was considered to be unattractive and corrupt. It seems that judiciaries in many post-Communist countries did not manage to rid themselves of these legacies. According to Eurobarometer data, between 2004 and 2017, in the old EU member states, on average 57% of citizens tended to trust their national justice/legal system, while in the new EU member states, it was only 36%.[97]

Finally, the level of public confidence in the judiciary is influenced by the performance of the courts and judges, and because confidence in the judiciary is closely intertwined with confidence in other political institutions, also by their performance. Regarding *performance of the judiciary*, previous research shows that higher judicial *independence,* as rated by country experts, has a positive effect on an individual's confidence in the judiciary.[98] Regarding courts' *activity and workload*, it seems that the number of cases heard decreases the level of public confidence,[99] but a greater number of appeals helps to increase it.[100] *Visibility* of the judiciary, measured as the media exposure of courts and

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[92] IVANA MARKOVA, TRUST AND DEMOCRATIC TRANSITION IN POST-COMMUNIST EUROPE 1-23 (2004).

[93] Sztompka, *supra* note 41, at 152-153.

[94] Roger Sapsford & Pamela Abbott, *Trust, Confidence and Social Environment in Post-Communist Societies*, 39 COMMUNIST AND POST-COMMUNIST STUDIES 59-71 (2006).

[95] *Id.* at 160.

[96] ZDENEK KÜHN, THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION? 53 (2011).

[97] http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/index.

[98] *E.g.,* Bühlmann & Kunz, *supra* note 48, at 332. Salzman & Ramsey, *supra* note 61.

[99] *E.g.,* Stoutenborough & Haider-Markel, *supra* note 61, at 41.

[100] *E.g.,* Kelleher & Wolak, *supra* note 65, at 715.

judges, has a positive effect on public confidence.[101] The same applies for *gender and ethnic diversity on courts*: smaller disparities between the share of women and ethnic minorities in the population and in the courts increase public confidence in the judiciary.[102] As per *judicial selection method* (appointment or election), some studies claim that it does not affect public confidence,[103] but another study claims that states with elected judges have a lower level of confidence in the judiciary.[104] The *power* of the judicial system, measured as the possibility of the courts to check the constitutionality of political decisions, seems to have no significant effect on individual confidence.[105] Lastly, and not surprisingly, judicial actions can also have a significant effect on changes in public confidence.[106]

Regarding *performance of the state and its institutions*, the results of previous studies are yet again mixed. Higher income inequality and poverty rates decrease public confidence in political institutions,[107] but unemployment rates, tax burdens or inflation seem to have no effect.[108] Some studies found a negative relationship between crime rate and public confidence in the judiciary,[109] others claim that this factor is not significant.[110] Finally, political events and affairs do affect the level of public confidence in courts, although, naturally, no general conclusion can be drawn in this respect.[111]

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[101] *E.g.,* Stephan Grimmelikhuijsen & Albert Klijn, *The Effects of Judicial Transparency on Public Trust: Evidence From a Field Experiment,* 93 PUBLIC ADMINISTRATION 1006-1007 (2015).

[102] *E.g.,* Kelleher & Wolak, *supra* note 65, at 715.

[103] *E.g.,* Wenzel, Bowler & Lanoue, *supra* note 62, at 205. Anthony J. Nownes & Colin Glennon, *An Experimental Investigation of How Judicial Elections Affect Public Faith in the Judicial System,* 41 LAW & SOCIAL INQUIRY 56 (2016).

[104] *E.g.,* Benesh, *supra* note 12, at 704.

[105] *E.g.,* Bühlmann & Kunz, *supra* note 48, at 328.

[106] *E.g.,* Caldeira, *supra* note 13, at 1223.

[107] *E.g.,* Jean M. Twenge, W. Keith Campbell & Nathan T. Carter, *Declines in Trust in Others and Confidence in Institutions Among American Adults and Late Adolescents, 1972–2012,* 25 PSYCHOLOGICAL SCIENCE 1921 (2014).

[108] *E.g.,* Kelleher & Wolak, *supra* note 65. Caldeira, *supra* note 13, at 1219.

[109] *E.g.,* Benesh, *supra* note 12, at 704.

[110] *E.g.,* Caldeira, *supra* note 13, at 1219. Kelleher & Wolak, *supra* note 67.

[111] *E.g.,* Caldeira, *supra* note 13, at 1219.

D. How the Establishment of a Judicial Council Can Enhance Public Confidence in the Judiciary? Theoretical and Empirical Considerations

Having identified the determinants that potentially influence public confidence in the judiciary, it is now time to focus on judicial councils and their location among other factors. As demonstrated in Section B, as well as in numerous articles analyzing the national level mechanisms of judicial self-governance included in this Special Issue, the establishment of judicial councils has been associated with diverse, yet invariably great, expectations. In short, judicial councils were expected to enhance the quality of the judiciary, usually via strengthening judicial independence and autonomy (according to the authors of this Special Issue, this was the main purpose for the establishment of judicial councils e.g. in Spain, Romania, Slovakia and Turkey), or via improving its effectiveness and efficiency (e.g., in the Netherlands). With some exaggeration, judicial councils are supposed to work as *deus ex machina* and resolve the seemingly unsolvable problems of judiciaries. If judicial councils manage to fulfill these expectations, they should improve both judicial system performance and public image, and, consequently, enhance public confidence in the judiciary. This section explores this link both theoretically and empirically. First, it introduces a concept map depicting how public confidence in the judiciary emerges and discusses the possible effects of judicial councils within this context (Part I.). Second, based on the national case studies in this volume, it reviews the extent to which judicial councils in ten countries[112] fulfilled the expectations that were invested into them (Part II.). Third, based on longitudinal Eurobarometer survey data, it examines whether the countries with judicial councils enjoy higher levels of public confidence in the judiciary than the countries without judicial councils (Part III).

I. How Can Judicial Councils Help to Raise the Level of Public Confidence in the Judiciary?

Public confidence in the judiciary is an intricate and multifaceted phenomenon, which, as shown in the previous section, has a many determinants (Section B). Thus, to answer the question of how judicial councils are potentially able help to enhance public confidence, we need to place them into the wider context. To show how limited the potential role of judicial councils is, we present a concept map explaining how public confidence in the judiciary emerges.

The concept map (Figure 2) is based on the literature review introduced in Section C. It takes into account social-psychological, cultural and institutional theories, and a variety of variables which, according to empirical studies, were statistically significantly associated with the level of public confidence.

[112] France, Ireland, Italy, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Turkey.

Figure 2: Public confidence in the judiciary: a conceptual map (Source: authors)

First, on the individual level, public confidence in the judiciary has three main sources. Our inclination to have confidence in the judiciary builds on our perception of its performance, which partially stems from our tendency to have confidence in other people (the amount of interpersonal trust/confidence), and in other political institutions, mostly government and parliament (the amount of institutional confidence). People form their opinions on the performance of the judiciary (e.g., perceived and experienced fairness and independence of judiciary; delays; costs; level of corruption; agreement with specific rulings; etc.) mostly based on how it is presented in the media, and, to a lesser extent,[113] on their direct or indirect experience with judges and courts.

[113] In the 2013 Eurobarometer survey, a majority of respondents - 57% - claimed to have no personal experience of any type of courtroom within the last ten years, and no close relative who has had this kind of experience. Source: European Commission, *Justice in the EU. Flash Eurobarometer 385 (2013),* http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_385_en.pdf2013 (last visited Oct. 12, 2018).

Second, on the institutional level, what matters for building confidence is the actual performance of the judiciary (e.g., fairness; efficiency; independence; ease, and cost of access; effectiveness; competency; equality; etc.), as well as its media coverage.

The third, the cultural level (wider historical, societal, political, and economic conditions) is not linear but permeates both the institutional and individual levels. It affects not only the performance of political institutions, including the judiciary, and the way they are depicted in the media, but also the expectations and evaluations of the institutional performance by citizens. Thus, we claim that the trichotomy between social-psychological, institutional and cultural theories of public confidence is a false one and that they should rather be seen as mutually supplemental and interconnected layers of determinants of public confidence.

It must be noted that although, for the sake of simplicity, the concept map depicts the performance of the state and judiciary as the cause and public confidence as the effect, this relationship is not unidirectional. As suggested by Van de Walle and Bouckaert, performance has a certain impact on confidence, but the existing level of confidence may also have an impact on perceptions of performance.[114]

It follows from the above that the potential of judicial councils to affect the level of public confidence in the judiciary is very limited. Obviously, they cannot have any direct effect on the individual level, and they are too weak and subtle to affect the wider cultural level (it is rather the other way round, the cultural level may co-determine the existence and functioning of judicial councils). Nor can they affect the level of confidence in other political institutions or interpersonal confidence. Thus, the window of opportunity for judicial councils is very constrained: their effect on public confidence in the judiciary can only be traced on the institutional level, and even here they compete for competences and influence with other actors. They can enhance public confidence in the judiciary by improving the performance of courts and judges, and by improving their media coverage. For instance, if judicial councils manage to enhance the independence of the judiciary and increase its effectiveness and efficiency as promised, this improved institutional performance should lead to better media coverage of the judiciary and better personal experiences of citizens with judges and courts, and thus to higher public confidence. It must once again be noted that as the majority of citizens lack first-hand experience of the justice system,[115] and do not feel well-informed about it,[116] media coverage seems to be at least as important as institutional performance. It can be assumed that citizens are not much interested in nor are they knowledgeable about the institutional setup of the

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[114] Steven Van de Walle & Geert Bouckaert, *Public Service Performance and Trust in Government: The Problem of Causality,* 26 INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION 908-909 (2003).

[115] European Commission, *supra* note 113, at 6.

[116] European Commission, *supra* note 113, at 16.

judiciary, and what matters for them is how persuasive the judges are in explaining their decisions in salient cases, how fair the judiciary seems to be to different societal groups (including the most and the least powerful), how often scandals and affairs regarding judges and courts occur (their absence, signaling the lack of self-cleaning mechanisms, can be as damaging as their all too frequent occurrence), and how other judges behave when these occur.

In other words, if judicial councils want to enhance the level of public confidence in the judiciary, they not only need to improve the quality of judicial systems noticeably, but they also need to be able to make this improvement visible and persuasive to the media and citizens. In this sense, trustworthy and active representatives of judicial councils who are willing and able to present the work of the council publicly, as well as to name and comment on the problems and sore spots of the judicial system instead of helping to hide them, are indispensable.

II. (Mostly) Failed Expectations: Do Not Expect Independence and You Will Not Be Disappointed

To summarize, the potential role of judicial councils in enhancing the level of public confidence in the judiciary is rather narrow: from the plethora of potential factors influencing public confidence, they can affect institutional performance and media coverage of the judiciary, and even these only partially. To further investigate this link on an empirical level, we need to explore to what extent the expectations of judicial councils have been fulfilled, and to what extent they have helped to improve the quality of judicial systems and their media representation. This endeavor is inescapably hindered by the lack of data and scholarly literature. As there is no comparable data on the media coverage of the judiciary in various countries, we focus solely on the extent to which judicial councils improved the quality of judicial systems. Even though the first judicial councils were established in the post-war era in the midst of 20th century, the literature assessing their impact has been very scarce. Fortunately, we can make use of the case studies presented in this Special Issue, and summarize their results.

Based on the case studies describing the functioning and effects of judicial councils in France, Italy, Poland, Spain, Turkey, Romania, Slovenia, Ireland, Slovakia, and the Netherlands, we can conclude that judicial councils rarely manage to improve the judicial systems that have been previously significantly flawed, but they are more successful in enhancing the quality of judicial systems which have already functioned quite well. In this sense, the effects of judicial councils resemble the biblical *"Whoever has will be given more, and he will have an abundance. Whoever does not have, even what he has will be taken away from him."*[117] More concretely, when judicial councils are established with the

[117] MATTHEW 13:12.

hope they will become guarantors of judicial independence in countries where independence of the judiciary has been an issue, they rarely seem to fulfill this expectation, and if they do, it is usually a long process. But if they are established in countries where independence of the judiciary has not been a concern, and they are instead expected to enhance effectiveness and efficiency, they seem to achieve their goals. This means, in line with O'Brien's argument, that a culture of judicial independence and respect for the independent role of the judiciary by all the stakeholders is more important than formal controls and institutional design.[118] It also brings us back to the previously mentioned suggestion that judicial councils in new, emerging post-communist democracies faced huge risks if established within judiciaries which had not undergone any lustrations or other personnel exchange after the transition.[119]

In Romania, Slovenia, and Slovakia, the establishment of judicial councils aimed to secure the independence of the judiciary after the Communist regime, in compliance with the recommendation of the Council of Europe and the pressure from the European Commission. In Romania, as suggested by Selejan-Guțan[120], the judicial council "was not sufficient for protecting the true independence of the judiciary", and the majority of citizens do not have confidence in the judiciary. In Slovenia, as Avbelj puts it, the judicial council has had a limited impact on independence, accountability, legitimacy, transparency of and confidence in the judiciary, and there have even been cases in which its (in)action negatively affected these values.[121] Public confidence in the Slovenian judiciary is very low; it has been in persistent decline since 2007, and is today the lowest among all the Member States of the European Union.[122] Regarding Slovakia, according to Spáč, Šipulová, and Urbániková, the link between the establishment of a judicial council and any potential improvement in these values is, at best, dubious.[123] Moreover, Slovakia can serve as definite proof that the mere establishment of a judicial council does not automatically lead to higher public confidence in courts and the judiciary: public confidence in the Slovak justice/legal system constantly belongs among the lowest in the entire European Union.[124] This is also due to the numerous scandals and affairs involving the top representatives of

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[118] Patrick O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* in this issue.

[119] Kosař, *supra* note 18.

[120] Bianca Selejan - Guțan, *Romania: Perils of a "Perfect Euro-Model" of Judicial Council,* in this issue.

[121] Matej Avbelj, *Contextual Analysis of Judicial Governance in Slovenia,* in this issue.

[122] Avbelj, *supra* note 121.

[123] Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia,* in this issue.

[124] European Commission, *supra* note 113, at 13.

the judicial council.[125] Although the institutional framework in these three countries gives "the impression of de jure impeccability",[126] due mostly to cultural reasons (e.g. remnants of the Communist totalitarian past, formal and informal interpersonal networks between politicians and judges, judicial corporatism) as well as institutional reasons (e.g., insufficient organizational capacity for efficient functioning), at best, judicial councils did not manage to fulfill the expectations placed on them, and did not help to enhance public confidence in the judiciary. At worst, they may have even helped to decrease it.

Spain and Turkey offer a very similar story: what was expected from judicial councils, but remained undelivered, was once again judicial independence. Torres Pérez claims that in Spain, the political capture of judicial councils prevents it "from fulfilling its goal and has contributed to undermining public confidence in the judiciary as a whole".[127] In Turkey, according to Çalı and Durmuş, it has been "suspect, whether the different forms of JSG have promoted judicial independence, given the highly politicized conditions that led to many of the JSG reforms".[128]

Regarding France, Italy, and Poland, we can note some mixed results: although the judicial councils helped to secure independence, other problems arose. Vauchez concludes that even though the judicial council in France "has undoubtedly gained competences and institutional autonomy, it remains firmly embedded in a dense web of links and dependences that secure its integration within the body of the State".[129] Similarly, Benvenuti and Paris claim that in Italy, even though the High Council of the Judiciary played a crucial role in securing the independence of the judiciary from the executive power, this does not apply to the internal independence, and that "while securing the independence of the judiciary, the Italian model of JSG has been far less effective in making the judiciary accountable, which in turn may have affected professionalism and diminished public confidence."[130] Finally, Śledzińska-Simon's analysis of the Polish case shows that even though in Poland (unlike in the above-mentioned post-communist countries), the Judicial Council succeeded as a guarantor of independence, this was not enough to enhance public confidence in the judiciary; under the slogan of democratization,

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[125] Spáč, Šipulová & Urbániková, *supra* note 123.

[126] Avbelj, *supra* note 121.

[127] Aida Torres Pérez, *Judicial Self-government and Judicial Independence: The Political Capture of the Judicial Council in Spain,* in this issue.

[128] Başak Çalı & Betül Durmuş, *Judicial Self-Government as Experimental Constitutional Politics: The Case of Turkey,* in this issue.

[129] Antoine Vauchez, *The Ever Protracted Rise of Self-Government in France,* in this issue.

[130] Simone Benvenuti & Davide Paris, *Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model,* in this issue.

the Government used the distance between the public and the judiciary to push through its judicial reform (2017) diminishing the position of the judicial council.[131]

There are two exceptions from these more or less skeptical national summaries: the Netherlands and Ireland. It seems that in both countries, judicial councils were established to improve the management of the courts, and they were not expected to become the guarantors of judicial independence, also because in both countries, the judiciary has traditionally enjoyed a high level of independence. In these cases, the promise has been fulfilled. Regarding Ireland, O'Brien argues that "the creation of the Courts Service has allowed the judiciary to improve the public image of the courts through improved facilities and have increased the transparency of the courts system through the Courts Service website and annual reports. It is possible that these changes have played a small role in enhancing public trust and improving the legitimacy of judges and the courts."[132] Mak concludes that "judicial self-government in the Netherlands can be assessed as functioning adequately" on the basis of a combination of rule-of-law values and new public management values (effectiveness, efficiency, and a client-oriented system), and that "there is a high level of trust in the Dutch judiciary, which steadily ranks at around 70%".[133] Curiously, in this case, the establishment and functioning of judicial councils led to concerns that the new public management approach puts judicial independence at risk: some judges did not feel represented by the Council, objected to the temporary appointment procedure for new court presidents, and claimed that the assessment of judicial performance had come to emphasize output too much.[134] Thus, whereas the vast majority of countries establish judicial councils with the hope that they would secure independence, in the case of the Netherlands, the positive conclusion is that, fortunately, the judicial council did not put this value in danger.

III. Empirical Evidence: Do Countries With Judicial Councils Enjoy Higher Levels of Public Confidence in the Judiciary?

Based on the case studies focusing on the ten countries with judicial councils summarized above, we can conclude that in the majority of cases, the effects of judicial councils fell short of expectations, especially if they were supposed to strengthen and guarantee judicial independence. If judicial councils in the majority of cases do not help to substantially and visibly enhance the quality of judicial systems, there is no reason to assume that they are able to increase the level of public confidence in the judiciary. As

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[131] Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition* in this issue

[132] O'Brien, *supra* note 118.

[133] Elaine Mak, *Judicial Self-Government in the Netherlands: Demarcating Autonomy,* in this issue.

[134] Mak, *supra* note 133.

there are few examples of judicial councils delivering the expected results, we assume that, on average, judiciaries in countries with judicial councils do not enjoy higher public confidence than judiciaries in countries without judicial councils. To test this assumption, we examine longitudinal comparative Eurobarometer survey data on public confidence in the justice/legal system in all EU member states (representative national samples, > 15 year of age). To account for temporary increases and decreases caused by ad hoc factors, the analysis covers the time span between 2004 and 2017. Obviously, the data from public opinion polls do not allow us to move much beyond description: as demonstrated in previous sections, public confidence has a whole variety of determinants, and the existence and activity of a judicial council is only one of them. Thus, this analysis only reveals whether, in general, the countries with judicial councils are better off regarding public confidence, but it cannot serve as proof that higher or lower levels of public confidence are *the consequence* of the existence of a judicial council. In other words, the potential effects of judicial councils on public confidence can be only hypothesized.

As shown in Figure 3, regardless of the existence of a judicial council, citizens of the EU member states place greater confidence in the judiciary than they do in parliament or government, the other two branches of state power. In general, judiciaries in countries without judicial councils enjoy a higher level of public confidence than judiciaries in countries with them. In the former, between 2004 and 2017, on average 54% of citizens claimed to have confidence in the judiciary, while in the latter, it was only 44%. The level of public confidence in national parliament and government in both above-mentioned groups is identical: in countries with a judicial council, 33% of citizens tend to trust them, in countries without a judicial council, it is 38%.

Figure 3. Comparison of public confidence in parliament, government and judiciary in all EU countries with and without a judicial council from 2004 to 2017 (shares and standard deviations)[135]

As mentioned in previous sections, public confidence in the judiciary correlates with public confidence in political institutions and interpersonal trust/confidence, and, for various reasons, both of these are lower in the post-communist countries. At the same time, the post-communist countries were pushed by the Councils of Europe and the European Commission to establish judicial councils. Thus, lower public confidence in the judiciary in the group of countries with judicial councils may be caused by the mere fact that the share of new EU member states, where citizens tend to be distrustful toward other people and political institutions, is higher in this group (10 new EU member states v. 9 old EU member states) than in the group of states without judicial councils (3 new EU member states v. 6

[135] Source: Eurobarometer, own calculation. Legend: The shares of trusting citizens are computed as averages of respondents claiming to tend to trust in the respective institutions between October 2004 (the first Eurobarometer round when the data were collected in both the old and new EU member states), and November 2017. In all the countries under examination, judicial councils were established before 2004, with the only exception being Latvia which established its judicial council in 2010 (nevertheless, Latvia was included into the group of countries with a judicial council).

Countries without a judicial council: Austria, Croatia, Cyprus, Czech Republic, Finland, Germany, Greece, Luxembourg, United Kingdom.

Countries with a judicial council: Belgium, Bulgaria, Denmark, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

Question wording: I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust it or tend not to trust it? National parliament, National government, National justice/legal system.

old EU member states). To account for this effect, in Figure 4, we compared the level of public confidence between four groups of countries: the new EU member states with and without a judicial council, and the old EU member states with and without a judicial council.

It is obvious that the gap in institutional confidence between the new and the old EU member states persists: the level of public confidence in parliament, government, and the judiciary is considerably higher in the old EU countries. The highest level of public confidence is enjoyed by judiciaries in the old EU member states without judicial councils (63% of citizens tend to trust), followed by, with a 10 % margin, the judiciaries in the old EU member states with judicial councils (53% tend to trust). In the new EU member states, only slightly more than one-third of citizens have confidence in the judiciary, regardless of the existence of a judicial council.

Figure 4: Comparison of public confidence in parliament, government and judiciary in the new and old EU countries with and without a judicial council from 2004 to 2017[136]

[136] Source: Eurobarometer. For Legend, see supra note 135. New EU member states: Croatia, Cyprus, Czech Republic, Bulgaria, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia. The same timeframe (2004-2017) was applied to Bulgaria, Romania and Croatia, even though they became members of the EU in 2007 and 2013, respectively (however, the data is available since 2004). Old EU member states: Austria, Finland, Germany, Greece, Luxembourg, United Kingdom, Belgium, Denmark, France, Ireland, Italy, Netherlands, Portugal, Spain, Sweden.

In summary, it can be concluded that a) judiciaries enjoy higher public confidence than the other two branches of state power, b) institutional confidence, including confidence in the judiciary, is still considerably higher in the old EU member states than in the new ones, and c) regarding the level of public confidence in the judiciary, in the new EU member states, the existence of judicial councils does not make a difference, while in the old EU member states, judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them.

It has to be stated once again that based on the descriptive data, we cannot conclude with certainty to what extent the differences in the level of public confidence in the judiciary between the countries with and without judicial councils are caused by the effects (or the lack) of judicial councils. Public confidence is a complex phenomenon with plenty of possible determinants, and the data presented above do not allow us to separate the effect of judicial councils from the effects of other factors. Moreover, what is dubious is not only the existence of the effect of judicial councils on the level of public confidence in the judiciary, but also the direction of this relationship. As presented in Section B, judicial councils were usually established in reaction to particular problems and issues that were troubling the judiciaries: mostly flawed judicial independence, or, less often, the effectiveness and efficiency of court management. We therefore assume that, due to these drawbacks, these judiciaries may have already induced a lower level of public confidence, and hence, the lower public confidence may not be the consequence, but rather an antecedent, of the creation of judicial councils. After all, it is always easier to push ahead the creation of a new body when the current state of the art is unsatisfying; on the contrary, the motivation to change the institutional setup of a well-working judicial system is, naturally, much lower. Unfortunately, given that many judicial councils were established several decades ago, we do not have the data to test this assumption and examine the level of public confidence before and after the introduction of judicial councils.

E. Conclusion: The (False) Promise Broken?

Judicial councils emerge with very diverse aims, typically focusing on the enhancement of the independence, and efficiency and effectiveness of judicial systems. If successful, their existence and functioning should lead to better working courts, and, consequently, to higher public confidence in judicial systems. After the major wave of the establishment of judicial councils that occurred in the last decades, it is about time to stop and review the extent to which judicial councils managed to fulfill the high hopes that were invested into them. This paper focused on the thus far neglected questions of how judicial councils can contribute to higher public confidence in the judiciary, what the empirical evidence looks like in this regard, and whether the countries with judicial councils enjoy higher public confidence than the countries without them.

Public confidence in the judiciary is a complex and multifaceted phenomenon with a plethora of determinants, which makes the exploration of the possible effects of judicial

councils a challenging endeavor. Public confidence in judiciary emerges in an interplay between citizens' perceptions on the one hand, and performance of the judiciary on the other hand. People evaluate judicial systems mostly based on media coverage, and, to a lesser extent, based on their personal experiences with courts and judges. However, as the media creates reality at least as much as it reflects it, and as personal experience with the judiciary is usually quite rare and by no means representative, the link between perception of the judiciary and its performance is far from straightforward and mirror-like. Moreover, people's evaluations are a function of their expectations, which are partially subjective and variable, and partially rooted in shared cultural norms, values and beliefs – and none of these are in the hands of the judiciary or judicial councils. Finally, the tendency to have confidence in the judiciary is often influenced by the individual tendency to have confidence in other people and institutions in general, and by confidence in parliament and government in particular (because citizens often perceive the three main branches of power as "the establishment" and evaluate it together). This does not undermine the importance or relevance[137] of public confidence in the judiciary. It merely shows how complex and potentially fragile it is, and how difficult it is to strategize on how to enhance it or to measure any impact.

In this broad context, judicial councils have some, albeit rather narrow, potential to affect public confidence, mostly via improving the performance of the judiciary and its media image. Moreover, if judicial councils are to enhance public confidence, their representatives should induce trust and should not get involved in scandals and affairs (as self-evident as it may seem, some case studies from this Special Issue suggest that not all top figures in judicial councils have managed to do so). On the contrary, they should be able and willing to comment on and criticize the weak points (and weak figures) of the judiciary, assure the public that they are being taken seriously, and suggest remedies.

Based on the national case studies summarizing experiences with the functioning of judicial councils included in this Special Issue, it seems that judicial councils rarely manage to significantly improve institutional performance. They can enhance the quality of judicial systems that have already functioned quite well, but they do not tend to bring about change in the judicial systems that have been previously significantly flawed. More concretely, when judicial councils are established with the hope to become guarantors of judicial independence in countries where independence of the judiciary has been an issue, they do not seem to fulfill this expectation, or it is a lengthy process with mixed results. But, if they are established in countries where independence of the judiciary has not been a concern, and they are instead expected to enhance effectiveness and efficiency, they seem to achieve their goals. Nonetheless, the majority of countries reviewed in this Special

[137] After all, as the Thomas theorem says, "If men define situations as real, they are real in their consequences". Thus, citizens act according to their level of confidence in the judiciary, even though their perception does not necessarily need to be objective. WILLIAM ISSAC THOMAS & DOROTHY SWAINE THOMAS, THE CHILD IN AMERICA: BEHAVIOR PROBLEMS AND PROGRAMS 571-572 (1928).

Issue fall within the first, not the second scenario. In these cases, if judicial councils do not help to substantially and visibly enhance the quality of the judicial system, there is no reason to assume that they are able to increase the level of public confidence in the judiciary.

Finally, the analyses of the longitudinal comparative Eurobarometer data revealed that, on average, the EU countries without judicial councils are better off in terms of public confidence (by a 10% margin). Next, the citizens of both old and new EU states, regardless whether judicial council exists in their country or not, report higher confidence in the judiciary than other branches of state power (parliament or government). It must be noted that the gap in institutional confidence between the new and the old EU member states persists, with the citizens of the latter much more likely to have confidence in the judiciary, as well as parliament and government (by roughly one-third). After this was accounted for, the comparison revealed that in the new EU member states, the existence of judicial councils does not make a difference regarding public confidence in the judiciary, while in the old EU member states, judicial systems with judicial councils enjoy lower levels of public confidence than the ones without them.

That being said, this does not necessarily mean that the existence of a judicial council is to be blamed for lower public confidence. As already mentioned, the judicial councils have only limited power to deal with the structural causes of the lack of public confidence in the judiciary, which often has deeper cultural and societal roots. Also, based on the descriptive data, it is not possible to assess if and when public confidence decreased or remained low precisely due to judicial councils. Too many factors influencing public confidence remain hidden in a black box, and to assess other determinants of public confidence and isolate the effect of judicial councils, more empirical research is needed. Moreover, it is important to note that judicial councils seem to have emerged mostly in those systems which faced certain systemic problems, typically the lack of independence or low effectiveness of the courts, and therefore lower public confidence may be an antecedent rather than a consequence of the establishment of judicial councils. The evidence at hand only allows us to conclude that, in the majority of countries, judicial councils do not seem to fulfill the expectations that were invested into them nor do they significantly improve the quality of judiciaries, and consequently, they cannot enhance public confidence at least to the level enjoyed by the countries without judicial councils. We will never know how the systems would behave had the judicial councils not been established, though.

Articles

The Judicial Self-Government at the International Level – A New Research Agenda

By Nino Tsereteli & Hubert Smekal***

Abstract

The phenomenon of judicial self-government at international courts has thus far been vastly understudied. Our article fills this gap and systematically explores its personal dimension, both from formal and informal perspectives. Specifically, we focus on the selection, promotion, and removal of international judges. We build our analysis on studying legal instruments, such as constitutive treaties, statutes, and rules of procedure, which we subsequently supplement by anecdotal evidence of how they work in practice. We show that each international court is unique in terms of the forms and extent of participation of its judges in deciding on international judicial careers. There is a variation as regards the forms and degree of judicial self-government across international courts and across the relevant areas of decision-making for each court. However, some broader patterns and trends emerge from our examination of relevant provisions and practices. First, some courts display consistently low degrees of judicial self-government across all these areas of decision-making, while other courts display relatively higher degrees. Second, judicial self-government does not manifest itself at the international level in entirely the same way as it does at the national level. We found that while judicial self-government manifests itself relatively strongly in the areas of *promotions* and *removals* of international judges, it is limited in the area of *selection* of international judges. International courts are not, strictly speaking, self-governing in the latter area, because the sitting judges of these courts are rarely members of the bodies that decide or advise on selecting new judges. However, sitting judges of some international courts have become involved in the formation of the bodies screening candidates and/or in selecting the members of such bodies. Hence, judicial self-government has started manifesting itself in selection processes internationally, albeit in a limited fashion, with only indirect involvement of sitting international judges.

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A. Introduction

The research on international courts (ICs) acquired breadth and depth with their proliferation and empowerment.[1] Scholars focused on the diversification of their functions through the move beyond dispute settlement[2] and on the diversification of their beneficiaries, through the involvement of non-state actors.[3] They observed the resulting quantitative and qualitative changes, manifested in the increased number of judgments and the expansion of their reach into areas previously within the exclusive domain of states.[4] Apart from ICs as institutions, scholars have taken interest in judges as members of those institutions and more broadly, of the community of knowledge-based experts.[5] They pointed to the emergence of a global judicial community, bound together by shared values and beliefs,[6] due to their similar professional experiences and increased opportunities for interaction.[7] The recent backlash towards certain ICs, which culminated in withdrawals from the jurisdiction of these courts[8] or in the initiation of reforms arguably meant to weaken them,[9] shifted scholarly attention to ascertaining patterns of governmental

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[1] Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT. LAW 73–91 (2009); THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, (Cesare Romano, Karen J. Alter, & Yuval Shany eds., 2014); KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

[2] Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT. LAW 49–72 (2013) (identifying three more functions beyond dispute settlement: the stabilization of normative expectations, law-making, and the control as well as legitimation of authority exercised by others); YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 37–45 (2014) (identifying four generic goals of ICs: norm support, dispute settlement, regime support and legitimizing public authority).

[3] See Robert Howse, *Moving the WTO Forward - One Case at a Time*, 42 CORNELL INT'L L.J. 223 (2009) (focusing on the reorientation of international law toward the interests, values, and rights of persons and peoples, not just states, through the evolution of human rights law, the law of war, and humanitarian law).

[4] Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN L. REV. 429, 439 (2003).

[5] DANIEL TERRIS, CESARE ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES xix (2007).

[6] Daniel Terris, Cesare P. R. Romano & Leigh Swigart, *Toward a Community of International Judges*, 30 LOYOLA LOS ANGEL. INT. COMP. LAW REV. 419–472 (2008); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. LAW J. 191 (2003).

[7] Terris, Romano, and Swigart, *supra* note 6.

[8] Burundi withdrew from the Rome Statute (see https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf); Venezuela withdrew from the jurisdiction of the Inter-American Court of Human Rights (IACtHR).

[9] Particularly, the attempts of the UK government at the Brighton Conference in 2012 and of the Danish government at the Copenhagen Conference in 2018 to advance initiatives weakening the Court. *See* Philip Leach & Alice Donald, *A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten*, Feb. 21,

resistance and resilience techniques adopted by judges in response.[10] The regulation of judicial careers and administration of courts emerged as a source of fragility, or strength, of these courts, depending on the institutional set-up chosen. Judges claimed a greater role in decision-making on judicial careers and in administering their respective courts, while governments sought to retain control over these areas and through them, over jurisprudential outputs,[11] or reluctantly gave up control to an extent required to secure the credibility of these courts. Structuring the decision-making processes in these areas raises complex questions about the role of different actors and the impact of their involvement on *inter alia* the independence, accountability, and legitimacy of ICs.

Scholars have examined decision-making processes through which international judges are selected/removed and ICs are administered[12] as well as consequences of implementing those processes *inter alia* for the independence, accountability, social legitimacy and effectiveness of these courts.[13] Scholars have observed the trade-offs between some of these values, faced by states that design ICs and by judges that serve on them,[14] as well as the motivations behind the choices made.[15] To better understand these decision-making

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2018, https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/.

[10] Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash against international courts: explaining the forms and patterns of resistance to international courts*, 14 INT. J. LAW CONTEXT 197–220 (2018).

[11] The selection of new judges has been viewed as a mechanism for controlling judges. Laurence Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo* 93 CAL. L. REV 899 (2005). For a comment on the implications of the politicization of selection processes for the independence of ICs in general and on the US Government blocking the reappointment of a South Korean judge due to its disagreement with the decisions made by that judge, see Manfred Elsig, Mark Pollack & Gregory Shaffer, *The U.S. is causing a major controversy in the World Trade Organization. Here's what's happening.*, WASHINGTON POST, June 6, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/).

[12] Concerning the selection of international judges, see RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS (2010); SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS, (Michal Bobek ed., 2015); Kate Malleson*, Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, 58 INT. COMP. LAW Q. 671 (2009); De Baere et al. partially dealt with these issues, but their particular focus has been on the rule of law. See Geert De Baere, Anna-Luise Chann & Jan Wouters, *Assessing the Contribution of the International Judiciary to the Rule of Law: Elements of a Roadmap*, SSRN ELECTRON. J. (2015), http://www.ssrn.com/abstract=2704266.

[13] Paul Mahoney, *The International Judiciary – Independence and Accountability*, 7 LAW PRACT. INT. COURTS TRIB. 313–349 (2008); Başak Cali, Anne Koch & Nicole Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUM. RIGHTS Q. 955–984 (2013); SHANY, *supra* note 2; SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS, *supra* note 12.

[14] Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT. LAW 225–276 (2017).

[15] Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387 (2008-2009).

processes, it is essential to discern specific roles of political and judicial actors within these processes and trace any transfers of powers between them. To our knowledge, the participation of international judges in forming and operating their respective courts, which is an indication that the ICs are self-governing, has not been systematically and exhaustively examined to identify the relevant developments within each court and variations across courts.[16] Scholars have occasionally referred to judicial empowerment in specific areas. As an example, Mahoney has usefully pointed out that, as regards the removals of judges by judges, "there is no alternative to direct self-regulation by each international court or tribunal, given the absence of an international "judicial council" of the kind found in many national legal systems."[17] Another decision-making process, which recently attracted scholarly attention due to increased judicial engagement, is the selection of judges.[18] The establishment of expert bodies for screening governmental nominees was a move towards not only de-politicization and professionalization of judicial selection processes [19] but also towards their judicialization, in the sense of allowing or increasing the involvement of judges. The election of senior national judges to such a panel prompted labeling it as "a germ of a council of judiciary."[20] Direct involvement of the two European Courts' Presidents in selecting members of such panels made one commentator suggest that "some embryonic form" of judicial self-government was emerging.[21] However, the exact character and extent of judicialization of the process of selecting international judges have not so far been explored.

Our paper seeks to fill in the gaps in scholarship by systematically exploring relevant legal instruments, such as constitutive treaties, statutes, and rules of procedure, to identify the forms and degree of judicial self-government (JSG) allowed/tolerated by states at the international level.[22] We use the definition of JSG Kosař proposes in the introduction to this

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[16] Even in case of one of the most studied ICs – the CJEU – the phenomenon of JSG remains "largely under-studied" (Alberto Alemanno & Laurent Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU's court system*, 54 COMMON MARK. LAW REV. 129, 130 (2017)).

[17] Mahoney, *supra* note 13 at 342.

[18] SELECTING EUROPE'S JUDGES, *supra* note 12.

[19] MACKENZIE ET AL., *supra* note 12 at 5.

[20] SELECTING EUROPE'S JUDGES, *supra* note 12 at 287. Sauvé has used the term in relation to the "Article 255 panel" (CJEU). See Jean-Marc Sauvé, *Selecting the European Union's Judges, The Practice of the Article 255 Panel*, *in* SELECTING EUROPE'S JUDGES, 84 (Michal Bobek ed., 2015).

[21] Alberto Alemanno, *How Transparent is Transparent Enough? in* SELECTING EUROPE'S JUDGES 202, 204 (Michal Bobek ed., 2015); See also Dumbrovský et al., *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, 51 COMMON MARK. LAW REV. 455–482 (2014) (noting that if the majority of the Panel members are chosen at the will of the Court of Justice's President, as has happened so far, one might foresee a subtle move into the direction of judicial self-government).

[22] Our approach resembles the one taken by Squatrito (Theresa Squatrito, *Conceptualizing, Measuring and Mapping the Formal Judicial Independence of International Courts*, SSRN ELECTRON. J. (2018),

special issue.[23] For the purposes of this study, the JSG bodies are the ones on which a judge or judges sit and which have some powers regarding court administration and/or the careers of judges. The research is of an exploratory nature. We have examined 24 ICs, in existence after 1948.[24] We seek to discern the variation as regards forms and degree of JSG across ICs and across the relevant areas of decision-making, i.e. selection, promotion and removal of judges, for each IC. This is to provide some context to the developments in Europe, covered in depth by two contributions in this special issue,[25] and to show how these developments fit in the broader narrative of the evolution of JSG.

Based on a careful examination of relevant norms and practices, two sets of observations will be made: one addressing the similarities and differences between how JSG manifests itself at the national and international levels and the other one addressing variations across ICs in terms of how much power international judges are given in forming and operating their respective courts. Along with these variations, we map emerging trends and patterns in the evolution of JSG at the international level.

It emerges that JSG does not manifest itself at the international level in entirely the same way as it does at the national level. National judiciaries are self-governing in the sense that judges are selected either by judicial councils with some participation of sitting judges or by court presidents. As regards the selection of international judges, most ICs are not, strictly speaking, self-governing, since sitting judges of those courts are rarely members of the bodies that decide or advise on selecting new judges. Given the fact that sitting judges

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https://www.ssrn.com/abstract=3131557), since we also examine the relevant treaties, statutes and rules of procedures of selected ICs. However, our criteria for identifying the relevant formal provisions differ from hers. We are specifically concerned with the element of judicial participation, and its effects on a number of values, including but not limited to judicial independence. She focuses specifically on the rules, which she considers to be institutional safeguards of judicial independence. Moreover, she employs a static approach when comparing courts at one point in time, while we try to look at the issue from a dynamic perspective, analyzing recent trends and highlighting critical junctures in development. The two papers thus complement each other.

[23] See David Kosař, Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, in this special issue.

[24] For the list of the studied ICs, see the Annex. The literature under the term international adjudicative bodies most often understands that these are "1. international governmental organizations, or bodies and procedures of international governmental organizations, that . . . 2. hear cases where one of the parties is, or could be, a state or an international organization, and that . . . 3. are composed of independent adjudicators, who . . . 4. decide the question(s) brought before them on the basis of international law . . . 5. following pre-determined rules of procedure, and . . . 6. issue binding decisions." Cesare PR Romano, Karen J Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues and Players*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 3, 6 (Cesare Romano, Karen J. Alter, & Yuval Shany eds., 2014). Our selection of ICs matches the selection of Karen Alter (ALTER, *supra* note 1), Kuyper and Squatrito (Jonathan W. Kuyper & Theresa Squatrito, *International courts and global democratic values: Participation, accountability, and justification*, 43 REV. INT. STUD. LOND. 152, 159-160, 175-176 (2017)) and Squatrito (Squatrito, *supra* note 22).

[25] See the articles by Christoph Krenn and by Başak Cali and Stewart Cunningham in this special issue.

of some ICs have been instrumental in the formation of the bodies screening governmental nominees and a few of them have served as members of such bodies after leaving their respective courts, it is fair to say that JSG has started manifesting itself in selection processes internationally. However, the role of sitting international judges has so far been limited and indirect in this area. JSG manifests itself relatively strongly in other areas of decision-making, such as promotions of international judges to the positions of court presidents as well as removals of international judges.

This study reveals that the degree of JSG varies across ICs. Not surprisingly, each IC is unique in terms of the forms and extent of judicial participation, but some broader patterns and trends emerge from the examination of relevant provisions and practices. Some ICs display consistently low degrees of JSG across the relevant areas of decision-making, namely selection, promotion and removal of international judges. Other ICs display relatively higher degrees of JSG across the same areas. This means that if one places these courts along a continuum, the former group of ICs will be concentrated somewhere towards the extreme end standing for governmental control, i.e. minimal JSG. The latter group of ICs will be concentrated somewhere towards the extreme end standing for judicial control, i.e. maximal JSG. In practice, it is rare for an IC to be either entirely government-controlled or entirely judge-controlled. Importantly, it is possible for ICs to move slowly from one extreme end to another. This is what has arguably been happening in the recent decade or so, with the gradual transformation of the process of selecting international judges.

The article is structured as follows: Part B briefly explains the framework for studying JSG at the international level and identifies the parameters of this specific study. Part C focuses on personal self-government of international judges. It seeks to identify the forms and extent of participation of international judges in decision-making on their careers, namely selection, promotion and removal of judges. Part D summarizes our findings, highlighting variations across ICs as well as the emerging trends and patterns we have observed. While there is some limited discussion on normative implications, we do not extensively reflect on whether it is appropriate for international judges to claim power, i.e. greater degree of JSG and how to best divide responsibilities between political and judicial actors or balance various values when designing ICs. Part E looks at the dimensions of JSG other than its personal dimension. Part F concludes.

B. How to Study JSG at the International Level?

As explained above, our purpose is to capture the nature and extent of JSG at the international level. The definition of JSG introduced by Kosař in the introductory chapter guides our study. We focus on one out of many possible dimensions of JSG[26] – personal

[26] See David Kosař, Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, in this special issue.

self-government. It covers participation of judges in decision-making on judicial careers, i.e. on becoming a judge, on being promoted or being removed from the bench. We chose this dimension for two reasons: first, this area has developed dynamically in the past decade. The states are increasingly establishing expert bodies, with some judicial participation in their creation and operation. Second, according to the literature, these areas display struggles for power between judicial and political elites.[27] This is because the idea of judicial participation challenged the monopoly political elites had.

Our interest is not limited to the entities composed exclusively of judges[28] or the ones in which judges are in the majority. We take the presence of at least one judge deciding or advising on the issues affecting the careers of judges as an indicator of the existence of some degree of JSG. Expert bodies selecting or screening candidates for judicial positions at ICs that have no current judges of these courts among their members cannot be seen as manifestations of judicial *self*-government *sensu stricto*. However, the inclusion of former judges of these ICs as members of such bodies alongside national judges and/or the involvement of sitting judges of these ICs in the selection of members of such bodies illustrates the expansion of the role of the judicial community in this area of decision-making. It is fair to say that the trend of establishing selection/screening bodies of this kind indicates increased openness towards the engagement of judges in areas previously monopolized by the governments/political organs of international organizations.

The study focuses on JSG at the level of specific ICs. In case of national judicial systems, in addition to separate courts, JSG can manifest itself at the level of the judiciary as a whole. This is not the case with ICs, as they arguably do not form part of a consolidated, hierarchical system. As highlighted by a number of scholars, an international judicial community may be emerging, thanks to the increased judicial dialogue and face-to-face communications between international judges.[29] However, the way in which judicial selection or other relevant areas of decision-making are organized is largely court-specific. In this sense, ICs can be likened to national constitutional courts. ICs, like constitutional courts, usually perform specific functions and are created and regulated by a special law. The selection process differs from regular courts, typically permitting only more senior judges to sit on the bench, who resolve highly political cases more often than regular judges. Sitting on international or constitutional courts can be perceived as a highlight of a legal career and those comparatively few performing these functions form specific communities.

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[27] Michal Bobek, *Epilogue*, *in* SELECTING EUROPE'S JUDGES 279, 288 (Michal Bobek ed., 2015) (arguing that the Parliamentary Assembly of the Council of Europe jealously guarded its leading role in the area of judicial selections, leaving the Advisory Panel established to screen the candidates in a precarious position).

[28] Examples include judges sitting as a plenary to elect court officials, discipline or remove judges; bureaus, through which judges organize the day-to-day activities of their courts; *ad hoc* committees examining complaints about judicial misconduct; court presidents; vice presidents and section presidents.

[29] *See supra* notes 6–7.

A key distinction to be kept in mind is the one between *de jure* and *de facto* JSG. The former can be ascertained from constitutive treaties, statutes, and rules of procedure. The latter requires taking a closer look at actual practices. In this article, we primarily aim at discerning a formal spectrum of JSG from the relevant legal instruments. We search for commonalities and differences in the degree of delegation from states to judges in selected issues. It is possible that judges acquire greater informal influence over the selection or other decision-making processes over time, going beyond what the formal framework governing their activities envisages. Such influence cannot be captured by the study of the relevant legal instruments. Therefore, where possible, we complement our examination of the rules with reflections from scholarly literature about the practical implementation of these provisions to approximate the description to the "real" functioning of JSG on the ground.

When designing international agreements, states make important decisions along three dimensions: the binding force of norms (obligation), the level of precision and the delegation of authority to resolve disputes and interpret norms.[30] All these elements of legalization are closely related and can be freely combined.[31] States may delegate authority to ICs, which then act as agents on their behalf.[32] Sometimes, if states have an interest in demonstrating their credibility to individuals as beneficiaries of the treaties, they may give courts greater latitude. In such instances, judges are "trustees" selected for their personal and/or professional reputation to make meaningful decisions on behalf of beneficiaries, rather than agents of states.[33] States make important choices not only when deciding on the extent of the delegation of powers to the ICs, but also when deciding on the level of precision in formulating the relevant treaties and statutes. The more precise and detailed the provisions of the treaties or statutes are, the less space the courts then have to shape their own rules and practices.[34] Conversely, vague provisions on courts in

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[30] Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT. ORGAN. 401–419 (2000).

[31] *Id.* at 404–408.

[32] Darren Hawkins et al., States, International Organizations and Principal–Agent Theory, in DELEGATION UNDER ANARCHY: PRINCIPALS, AGENTS AND INTERNATIONAL ORGANIZATIONS 3, 7 (D. Hawkins, et al. eds., 2006).

[33] Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT. RELAT. 33–63 (2008).

[34] Most courts formulate their own rules of procedure. See, for example, Statute of the International Court of Justice (ICJ), 26 June 1945, Art. 30; Statute of the International Tribunal for the Law of the Sea (ITLOS), Art. 16; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Art. 15; Statute of the International Criminal Tribunal for Rwanda (ICTR), Art. 14; World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17.9 (for the Appellate Body); European Convention of Human Rights (ECHR), Art. 25 (d); American Convention, Art. 60 and Statute of the Inter-American Court of Human Rights (IACtHR), Art. 25 (1); The Agreement Establishing the Caribbean Court of Justice (CCJ), Art. XXI (with the states inviting the President, in consultation with five other judges of the Court selected by him, to establish the Rules of the Court). The Rules of Procedure and Evidence of the International Criminal Court (ICC) has been

the treaties and statutes leave judges ample space to decide important issues for themselves.

C. Personal Self-Government: Identifying Patterns and Trends

Personal self-government covers participation of judges in making decisions that affect judicial careers, including the selection of judges, promotion to official positions within the court, and removals. This section seeks to identify trends and patterns in terms of judicial engagement in each of the above-mentioned areas.

I. Selection of International Judges[35]

We provisionally identify three stages of the process of selecting international judges: (1) nominating candidates for judicial posts, (2) screening them/advising on their suitability and, finally, (3) electing or appointing international judges. As regards the screening of governmental nominees, this idea is not entirely new [36] but took some time to materialize. The bodies composed of parliament members[37] or government representatives[38] have been in charge of scrutinizing nominees for some international judicial positions. However, there is an emerging trend of establishing expert bodies to fulfill that function. These bodies can be considered as bodies of JSG, if they involve sitting international judges as members or if international judges are otherwise involved with the establishment and operation of such bodies.

Governments typically control nominations for international judicial positions. There is a variation across courts as to how many candidates a government may or must nominate[39]

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adopted by the Assembly of State Parties. The Rome Statute of the International Criminal Court, in force since 1 July 2002, Art. 51.

[35] See also the article of Shai Dothan in this special issue, particularly the Introduction and section A.I.

[36] Jeffrey Golden, *National Groups and the Nomination of Judges of the International Court of Justice: A Preliminary Report*, 9 INT. LAWYER 333–349, 347 (1975) (suggesting the establishment of a UN Judicial Committee to rate or simply approve/disapprove in a non-binding manner the nominations by national groups for the ICJ).

[37] The Committee established by the Parliamentary Assembly of the Council of Europe scrutinizes candidates and ranks them. See Resolution 2002 (2014) of the Parliamentary Assembly of the Council of Europe, para 9.

[38] As an example, the UN Security Council screened nominees for the ICTY and the ICTR. The Council was to select between 28 and 42 candidates out of those nominated for the posts at the ICTY and between 22 and 33 candidates for the ICTR. TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 31 (arguing that this gives the permanent members of the Security Council an enhanced role when it comes to vetting candidates for ad hoc tribunals).

[39] For the CJEU, governments *must* submit one candidate. For the ECtHR, governments *must* submit a three-person list, see Art. 22 of the ECHR. For the ICC, a state party *may* nominate one candidate for any given election, see Art. 36 (4) of the Rome Statute.

and as to whether states have a guaranteed seat on the bench.[40] Even where governments do not nominate directly, irrespective of who does so on their behalf, the chance of picking candidates whom governments disfavor is limited. As an example, national groups choosing the nominees for the International Court of Justice (ICJ) were supposed to act independently of their governments.[41] They were supposed to consult national judicial and academic communities.[42] However, in practice, governments reportedly controlled the process by means of unofficial consultations.[43] The same problem of politicization of nominations emerged with the ECtHR.[44] The ECHR does not contain requirements as to the process through which governments should pick candidates. In recent years, the concern about the quality of nominees generated pressure for making national selection procedures more fair, transparent and inclusive.[45] This led to the increased judicialization of the national selection processes, through the inclusion of judges from apex courts in national selection committees advising governments.[46] Even former judges of the ECtHR and other ICs have become members of the bodies that screen candidates and advise the governments who to pick.[47] In the end, however, even if the governments consult national judges or other actors, in most instances, it is ultimately up to them to decide whom to nominate. Only a very limited number of legal texts regulating ICs have allowed candidates for judicial posts to apply directly for an appointment, thus sidestepping the governments in the nomination phase. Open competition in which states have limited control over who

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[40] The ECtHR and the CJEU are full representation courts, as their nominees have a guaranteed seat on the bench. This is not the case for most other courts.

[41] Clyde Eagleton, *Choice of Judges for the International Court of Justice*, 47 AM. J. INT. LAW 462 (1953). See also Golden, *supra* note 36 at 337 (noting that the intention of this method is clearly to diminish the control of the individual governments).

[42] See ICJ Statute, Art. 6.

[43] Golden, *supra* note 36 at 338.

[44] See David Kosař, *Selecting Strasbourg Judges*, *in* SELECTING EUROPE'S JUDGES 120–161 (Michal Bobek ed., 2015); Koen Lemmens, *(S)electing Judges for Strasbourg*, *in* SELECTING EUROPE'S JUDGES 95–119 (Michal Bobek ed., 2015); Norbert Paul Engel, *More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights,* 32 *HRLJ* 448 (2012).

[45] See Guidelines of the Committee of Ministers of the Council of Europe on the Selection of Candidates for the Post of Judge, CM(2012)40-final, 29 March 2012.

[46] Council of Europe. Steering Committee for Human Rights (CDDH), SELECTION OF CANDIDATES FOR ELECTION AS JUDGE TO THE EUROPEAN COURT OF HUMAN RIGHTS: PROCEDURE AND SELECTION CRITERIA IN MEMBER STATES (2017), https://rm.coe.int/selection-of-candidates-for-election-as-judge-to-the-court-procedure-a/168075ad58.

[47] See for example, the Report submitted by Albania to the PACE Committee, Doc. 14133, 12 September 2016, and Doc. 14279, 28 March 2017) (about inclusion of the President of the Constitutional Court and of the former ECtHR judge in the national selection commission). According to the UK Report (Doc. 14050, 28 April 2016), the selection panel was chaired by Dame Rosalyn Higgins, the former President of the ICJ.

applies was organized at the Civil Service Tribunal of the EU.[48] Its merger with the EU General Court, however, led to the discontinuation of this procedure. The candidates seeking appointments at the Caribbean Court of Justice can apply for posts directly, in response to an open call.[49] There are no signs however that this model will be replicated at other ICs.

The recent developments at supranational courts in Europe as regards increased engagement of the judicial community in selecting new judges resemble the trajectory of developments at the national level. Judges at both national and international levels slowly claim greater control on the composition of the bench. In the context of both the ECtHR and the CJEU, the idea of putting expert panels in charge of screening candidates was voiced by former international and national judges at least from the early 2000s.[50] Under the 2009 Lisbon Treaty, a judge-dominated seven-member expert panel was established to screen the candidates for the posts of judges (at the Court of Justice and General Court)[51] and Advocates Generals. In 2010, ECtHR President Costa followed suit and proposed the establishment of a similar panel.[52] Ultimately, the Panel was established, even though it does not feature in the Convention.[53] This development did not establish JSG at the two

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[48] 2004/752/EC, Euratom: Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal. Annex 1 The European Union Civil Service Tribunal. Art. 3 (2) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004D0752).

[49] Andrew N Maharajh, *Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court*, 47 CORNELL INT. LAW J. 735, 760 (2014).

[50] For the CJEU, see the Report produced by a working party composed largely of former judges of the ECJ and the then-Court of First Instance on behest of the Commission, named after Ole Due, former president of the ECJ, 2000, p. 51 (suggesting that an advisory committee consisting of highly-qualified independent lawyers should be set up to verify the legal competence of candidates, thereby assisting the member states in their deliberations). As regards the ECtHR, see Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, Interights (2003), 34-35. This Report was produced by a group of sitting and former judges of national courts. See also Report of the Group of Wise Persons to the Committee of Ministers, CM Documents, CM(2006)203, 979bis Meeting, 15 November 2006, para 118; Secretary General's contribution: http://www.astrid-online.it/static/upload/protected/Secr/Secretary-General---18-December.pdf, para 18 ("we should examine the idea of a mixed screening panel composed of prominent former high level national or international judges before transmitting the list of candidates to the Parliamentary Assembly for election").

[51] The Court of Justice of the EU consists of the Court of Justice (CJ) and the General Court (GC).

[52] For Judge Costa's proposal see, Doc. 12391 06 October 2010, National procedures for the selection of candidates for the European Court of Human Rights; Committee on Legal Affairs and Human Rights Rapporteur: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party.

[53] Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (Adopted by the Committee of Ministers on 10 November 2010 at the 1097bis meeting of the Ministers' Deputies).

courts in the sense that these courts chose their own members,[54] but to some limited extent increased the influence of the judicial community on the process of judicial selection,[55] at the expense of political elites. The regulations of these two panels specifically refer to the judicial background as a criterion for membership.[56] The members of the ECtHR Advisory Panel included a number of former ECtHR judges.[57] While the CJEU panel has been dominated by national judges from top courts, it has had at least one former CJEU judge as its member.[58] The Presidents of the two European Courts are directly involved in selecting the members of the respective panels. The President of the Court of Justice presents the proposals for the Panel's Composition.[59] The Committee of Ministers consults the ECtHR President when appointing the panel members.[60] Importantly, despite the fact that the two bodies were seemingly established with similar goals, they have developed into completely different creatures, with the ECtHR panel emerging as the weaker of the two, as it was not given the same tools and powers.[61]

Similar developments are noticeable in several other ICs. The Rome Statute of the International Criminal Court (ICC) envisaged the establishment by the Assembly of State

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[54] See Christoph Krenn, Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success, in this special issue.

[55] Dumbrovský et al., *supra* note 21.

[56] See for the ECtHR panel, Resolution CM (2010)26, part 2 (noting that the panel members should be chosen from among members of the highest national courts, former judges of the ICs, including the ECtHR and other lawyers of recognized competence); for the CJEU, TFEU Art. 255, para. 2 ("The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence").

[57] The ECtHR panel included former ECtHR judges: Wildhaber, Jaeger, Pellonpää, Costa, Mahoney, Vajic.

[58] Fifth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 28 February 2018, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/5eme_rapport_dactivite_du_c255_-_en_final_-_public.pdf (listing Mr. Christiaan Timmermans, the former President of the Chamber of the Court of Justice of the European Union, alongside a number of prominent national judges).

[59] TFEU Art. 255, para. 2.

[60] Resolution CM/Res(2010)26, part 3.

[61] Bobek, *supra* note 27 at 281; Sauve, *supra* note 20 at 83 (pointing out that while neither of these panels issues binding opinions, Art. 255 is in a better position, taking into account that the CJEU judges are appointed by a common accord of states – all states have to agree to overcome an unfavorable opinion of the panel. The PACE can appoint judges, irrespective of the unfavorable opinion of the panel, by a majority of votes); Engel, *supra* note 44 at 449 (pointing out that the ECtHR panel was "vested with less than real power" and that "all these disabling restrictions were introduced despite the existence of a convincing blueprint of a panel solution established by the European Union."); Lord Mance, THE COMPOSITION OF THE EUROPEAN COURT OF JUSTICE (2011), 24–27, https://www.supremecourt.uk/docs/speech_111019.pdf.

Parties (ASP) of an Advisory Committee for screening governmental nominees.[62] This Committee materialized only in 2012.[63] A few former ICC judges have been elected by the ASP as members of the Committee, alongside other eminent lawyers.[64] These developments inspired calls to create a similar screening body within the Organization of American States (OAS).[65] At this point, the candidates for posts at the IACtHR are scrutinized by an independent panel, convened by the Open Society Justice Initiative.[66] It is composed of jurists who served at ICs as well as academics and legal professionals.[67]

Interestingly, the idea of de-politicizing judicial selection processes and of involving judicial communities materialized outside Europe as early as 2006 when a Judicial Council was created for the ECOWAS Court of Justice. The job of this Council was to interview candidates and recommend the best-qualified persons, selecting three per country and forwarding them to the ECOWAS Authority to decide which candidate to appoint to the Court.[68] The Council consisted of the Chief Justices from member states not then represented on the seven-member Court,[69] thereby increasing the influence of national judges in the selection process.[70] Its creation had been preceded by the Court's direct conflict with the Nigerian judiciary and political establishment.[71] As one community official

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[62] The Rome Statute of the International Criminal Court, Art. 36 (4) (c).

[63] For the terms of reference for the Committee, see Resolution ICC-ASP/10/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 9th plenary meeting, on 21 December 2011.

[64] The former ICC judges that became members of the Advisory Committee included Philippe Kirsch, Daniel David Ntanda Nsereko, Adrian Fulford and Bruno Cotte. The Committee also included former judges from other ICs: Bruno Simma (the ICJ) and Manuel Ventura Robles (the IACtHR).

[65] See Laurence Burgorgue-Larsen, *Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members*, 5 NOTRE DAME J. OF INT & COMP. LAW (2015).

[66] Similar panel functioned for the ICC (established by the Coalition for the International Criminal Court), prior to the establishment of the Advisory Committee.

[67] The panel included Cecilia Medina, who prior to becoming the member of this panel was a member (1995-2002) and President of the UN Human Rights Committee (1999-2001) and subsequently a judge (2004-2007) and President of the IACtHR (2008-2009).

[68] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court For West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 759-760 (2013); Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences,* 27 EUR. J. OF INT'L L. 293–328 (2016).

[69] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006), ECOWAS Official Journal, Vol. 49 (2006).

[70] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *supra* note 68 at 759-760.

[71] *Id.*

observed, national high court judges were upset that the ECOWAS judges with fewer qualifications and experience could issue rulings that were binding upon them.[72] This model vesting the power of vetting candidates into Chief Justices of member states was not replicated. The establishment of the Committee consisting of Chief Justices of state parties was proposed for the ICC but was not ultimately supported.[73] It was thought at the time that, taking into account the substantive tasks of the Committee, it would be appropriate to have experts with diverse backgrounds as its members, rather than exclusively Chief Justices, who, while authoritative, were perceived as state representatives.[74]

Even though international judges are increasingly involved in selecting new judges through membership in screening bodies or otherwise, they do not have the final word. Political branches of international organizations consisting of the representatives of national governments[75] or legislatures[76] elect judges. The other solution is that governments collectively approve judges, acting outside a strictly delineated organizational structure.[77] Where governments have a guaranteed seat on the IC, there is a relatively smaller need for engagement in political bargaining. Where the number of seats is lower than the number of governments and nominees, governments have less control over the outcomes of an election and a greater need to consolidate support among other governments for the candidates they favor. There is one court, the Economic Court of the Commonwealth of Independent States, in which individual states directly choose judges without any collective approval.[78]

One departure from these government-dominated systems of judicial selection is the model of the Caribbean Court of Justice (CCJ). It manifests some degree of JSG, even at the

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[72] *Id*.

[73] Medard R. Rwelamira, *Composition and Administration of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee ed., 1999), 153, at 163.

[74] Thordis Ingadottir, The International Criminal Court, Nomination and Election of Judges, PICT Discussion paper, 2002, 33.

[75] As an example, the UN General Assembly elected permanent judges for the ICTY. See ICTY Statute, Art. 13 bis (1) (d). The judges of the ICJ are elected by the UN General Assembly and Security Council. See ICJ Statute, Art. 4.

[76] This is the case with the ECtHR, see ECHR, Art. 22.

[77] For example, judges of the Court of Justice and General Court of the EU "shall be appointed by common accord of the governments of the Member States" (TFEU, Arts. 253 and 254).

[78] See Economic Court of the Commonwealth of Independent States (http://courtcis.org/index.php/2013-05-14-08-49-44/judges).

level of appointment of judges.[79] The Regional Judicial and Legal Services Commission appoints all judges with the exception of the President, who is appointed by the governments upon the recommendation of the Commission.[80] In contrast to the two European panels that have no sitting judges of the respective courts among their members, the Commission has the CCJ President as its chairperson.[81] Other members include bar representatives, academics, chairpersons of national judicial and public services commissions, and civil society representatives. [82] Hence, its composition is more diverse than that of the two European panels. Interestingly from our perspective, where any person or body required to nominate a candidate for appointment to the Commission fails to make a nomination, the heads of judiciaries of contracting parties make the nomination jointly.[83] This means that national judges can indirectly influence the concluding part of the selection process through nominations to the appointing authority. Another noteworthy system for electing international judges also comes from the Americas. Members of the Central American Court of Justice "shall be elected by the supreme courts of justice of the Member States."[84]

One may argue that ICs are not self-governing in the domain of selecting new judges because sitting judges of these courts are rarely members of the bodies that decide or advise on this matter. While sitting judges of some ICs have been involved in forming the bodies screening governmental nominees and in picking the members of such bodies, their role in selecting new judges remains largely limited and indirect. Hence, it may be premature at this point to argue that recent selection procedure reforms indicate a significant rise in JSG at the international level, i.e. the empowerment of judges at the expense of political elites. However, the engagement of senior national judges and former international judges in the selection and screening processes signifies the growing role of the judicial community in areas previously monopolized by governments. This tendency arguably challenges traditional views about the relationships between governments and ICs. It seemingly contradicts the expectation that the governments will be reluctant to accept any development that constrains them and prevents them from appointing judges that best fit their preferences or from blocking the candidates that they dislike. Whether this development amounts to a genuine transfer of power from political to judicial elites or

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[79] Malleson, *supra* note 12 at 686 (noting that the Caribbean model of judicial selection offers an important comparative model to other ICs when considering possible methods for strengthening the institutional protection of judicial independence).

[80] The Agreement Establishing the Caribbean Court of Justice, Art. IV (6) (7).

[81] *Id*. at Art. V (1) (a).

[82] *Id*. at Art. V (1) (b)-(g).

[83] *Id*. at Art. V (2).

[84] The Statute of the Central American Court of Justice, Art. 10.

whether it is only a symbolic change intended to create the appearance of objectivity of selection processes is a separate question that can only be answered through in-depth scrutiny of how each institutional arrangement functions in practice.

II. Promoting Judges to Official Positions within the ICs

International judicial careers differ from careers in ordinary national judiciaries. Unlike hierarchical national judicial systems in which judges move up the career ladder, international judges are elected for limited terms and can only be promoted within their respective courts[85] by being elected to the position of President, Vice President or section president. Presidents of ICs fulfill manifold functions, both internally within the court as well as externally in relation to court principals (states), other international and national courts, potential users of the court, the academic community, and the public.[86] Terris *et al* point out that the presidents of ICs typically serve four distinct functions: judge, administrator, public spokesperson, and diplomat. The last involves the president in direct and frequent contact with governments: reporting on the work of the courts, securing funds and other resources, etc. His role requires a more delicate balance between the judicial and political functions of the Court.[87] Who selects the president therefore indirectly influences how the court performs.

Given the potentially powerful actors heading ICs, states had some alternatives to consider when designing the courts. They could have exerted control and named the presidents, or they could have left the task to the judges themselves. The latter option emerges as the predominant one. Most ICs have presidents elected by the judges among themselves.[88] JSG thus manifests itself very strongly in this important feature. Nevertheless, it can be attenuated by short periods of office and limited possibilities for re-election,[89] which prevent the presidents from building their own power base.

States deprive international judges of the possibility to fully decide on their own president in the following three ways: first, by rotating the office among the states;[90] second, by approving the judges' choice of the president; or, third, by directly selecting her. For

[85] Arguably, in the EU, a judge can rise from the GC to the CJ.

[86] See also Blisa – Kosař in this special issue.

[87] TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 159.

[88] ICJ Statute, Art. 21 (1); ITLOS Statute, Art. 12 (1); ECHR, Art. 25 (a), IACtHR Statute, Art. 12 (1), ICC Statute, Art. 38 (1); ICTY Statute, Art. 14 (1); ICTR Statute, Art. 13 (1).

[89] For example, the ICC President and Vice Presidents are eligible for re-election only once. ICC Statute, Art. 38 (1).

[90] "The Presidency will be held successively by one of the Magistrates in alphabetical order according to the names of their respective states." (Statute of the Central American Court of Justice, Art. 16).

example, the President of the Caribbean Court of Justice "shall be appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties on the recommendation of the Commission."[91] Similarly, at some African ICs, states dominate the election of the president of the court.[92] At the Economic Court of the Commonwealth of Independent States, judges elect the chairperson by a simple majority for a relatively long term of five years, but the successful candidate needs the subsequent approval of the Council of Heads of State.[93]

To sum up, when designing systems for choosing the dignitaries of ICs, states have opted for differing levels of JSG. Typically, international judges themselves choose their president, although this latitude can be limited by a rather short period in office, or by a cap on the number of possible renewals of the mandate. In some cases, predominantly outside Europe, states keep the level of JSG low by dictating the selection of court presidents, whose loyalty then does not lie primarily with their peers, but with their principals.

III. Removal of Judges

The last dimension of personal self-government covers involuntarily and prematurely terminating the mandate of judges. How states regulate the removal of judges in international treaties or court statutes, i.e. the choice they make between retaining control over this issue and letting judges decide, is bound to have considerable implications on the interplay between the independence and accountability of international judges.[94] The governments' power to end judicial careers can motivate judges to exercise self-restraint in their decision-making in order not to antagonize governments. While such a setup can make judges externally accountable, it is arguably capable of undermining judicial independence, as judges may be guided by the fear of removal when deciding cases. Conversely, when judicial peers decide on a removal, considerations of judicial values and ethics come to the forefront. It is a good way of insulating judges from political pressure.

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[91] The Agreement Establishing the Caribbean Court of Justice, Art. IV (6).

[92] The Authority, i.e. the Heads of State or Government, "shall designate one of the Judges of the Appellate Division as the President" of the Common Market for Eastern and Southern Africa Court of Justice (the Treaty Establishing the Common Market for Eastern and Southern Africa, Art. 20 (4)). The same holds also for the East African Court of Justice (the Treaty for the Establishment of the East African Community, Art. 24 (4)) and the Tribunal in the Southern African Development Community (the Protocol on the Tribunal in the Southern African Development Community, Art. 5 (1)).

[93] Gennady M. Danilenko, *The Economic Court of the Commonwealth of Independent States*, 31 N. Y. UNIV. J. INT. LAW POLIT. 893 (1998).

[94] Recently Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT. LAW 225–276 (2017); Paul Mahoney, *The International Judiciary – Independence and Accountability*, 7 LAW PRACT. INT. COURTS TRIB. 313–349 (2008).

However, such a setup can make judges unaccountable, due to the high level of corporate solidarity among them.[95] Thus, the settings of the removal process are important for judicial decision-making and subsequently for the overall functioning of the court.[96]

There is a variation across courts as regards the three parameters: (1) who can request a removal, (2) on what grounds, and (3) who decides on removing a judge. With regard to each of the three parameters, states may choose to retain control and use the fear of removal to secure the loyalty of judges or somehow factor their preferences into judicial decision-making or they may choose to delegate these issues to the judges, thereby reinforcing JSG.

The degree of judicial involvement differs significantly as regards the initiation of the removal procedure of judges from the ICs. It can either be judge-dominated, as in the case of the ECtHR, where any judge of that court may set in motion the procedure for dismissal from office,[97] or states-dominated, such as in the Andean Community where a government requests the removal of an international judge.[98]

There are some differences as to the grounds for removing judges and the degree of specificity in formulating them. Judges of some courts can be removed if they have ceased to fulfill the required conditions.[99] In other instances, grounds for removal include misconduct or inability to perform functions.[100] The vaguer the grounds, the easier it is to remove judges, other things being equal.

There is considerable variation in terms of who decides on the removal of judges. At one extreme end of the spectrum, removals are within the exclusive competence of judges. Hence, the degree of JSG is high. Examples of these include the ECtHR[101] and the CJEU.[102]

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[95] The citations are in the footnotes *infra* 120–122.

[96] Another important component of judicial independence might be the extent of immunities – see Helen Keller & Severin Meier, *Independence and Impartiality in The Judicial Trilemma*, 111 AJIL UNBOUND 344–348 (2017).

[97] The Rules of Procedure of the ECtHR, Rule 7.

[98] Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol), Art. 10.

[99] See, for example, ECHR, Art. 23 (4).

[100] See, for example, ICC Statute, Art. 46-47; The Rules of Procedure and Evidence, Rules 24 and 25, 29 (4), 32.

[101] See the ECHR, Art. 23 (4) (specifying that a judge will not be dismissed from office unless the other judges decide by a majority of two-thirds).

[102] See CJEU Statute, Art. 6: **"**A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, *in the unanimous opinion of the Judges and Advocates-General of the Court of Justice*, he no longer fulfils the requisite conditions or meets the obligations arising from his office."

For the decision to be made, a qualified majority or all judges have to support it.[103] At another end of the spectrum, governments themselves directly remove their judges[104] or the bodies consisting of the heads of states or governments[105] are in charge of removals. Hence, the degree of JSG in this specific area is low. In the middle of the spectrum are the solutions that engage both judicial and political decision-makers. The General Assembly of the Organization of American States (OAS) has disciplinary authority over the judges but may exercise that authority only at the request of the Court itself.[106] The African Court on Human and Peoples' Rights decide unanimously on removal, but the Assembly of Heads of States can set the decision aside at its next session.[107] As regards the ICC, the Presidency may initiate the process based on a complaint or act on its own motion.[108] It consults a three-judge panel (appointed based on automatic rotation)[109] but is not bound by the recommendation of that panel.[110] The judges sitting in a plenary can recommend removal of a judge by a two-thirds majority.[111] The Assembly of State Parties will then decide on the removal by a two-thirds majority of the State Parties.[112]

While in all the courts that have adopted a mixed solution, judges and political decision-makers are part of a single process, the model of the Caribbean Court of Justice divides responsibilities in a rather distinct manner. The heads of government can remove the President of the CCJ, while the Commission can remove its regular judges.[113] Since this Commission is composed neither of sitting judges nor of government representatives, the above-described solution leads to de-politicization to some extent, but at the same time does not secure a high level of JSG.

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[103] CJEU Statute, Art. 6 (unanimously). ECHR, Art. 23 (4) (by 2/3 majority).

[104] The Economic Court of the Commonwealth of Independent States, see Danilenko, *supra* note 93, at 898.

[105] The Summit (of heads of states or government) in case of the East African Court of (Treaty for the Establishment of the East African Community, Art. 26 (1)) and the Authority (of heads of states or governments) in case of the Common Market for Eastern and Southern Africa Court of Justice (Treaty Establishing the Common Market for Eastern and Southern Africa, Art. 22).

[106] IACtHR Statute, Art. 20 (2).

[107] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Art. 19.

[108] ICC Rules of Procedure and Evidence, Rule 26 (2).

[109] ICC Rules of Procedure and Evidence, Rule 26 (2).

[110] ICC Regulations, Regulation 120 (3).

[111] ICC Rules of Procedure and Evidence, Rule 29 ICC ROPE, Rule 37 (2) of the ROPE; ICC Statute, Art. 46 (2)(a).

[112] ICC (Rome) Statute, Art. 46 (2)(a).

[113] The Agreement Establishing the Caribbean Court of Justice, Art. 4 (6 and 7).

The model of the South African Development Community Tribunal (SADC) exemplifies another distinct solution: a judge can be removed based on the recommendation of an ad hoc independent tribunal established for this purpose.[114] As regards ECOWAS Court of Justice, disciplinary matters fall under the competence of the Judicial Council, which is also responsible for screening candidates for judicial posts.[115] As noted above, the Judicial Council is generally composed of the Chief Justices of the Supreme Courts from the Member States that have no judges at the Court.[116] For disciplinary matters, the Council additionally includes one representative of the judges of the ECOWAS Court of Justice, elected by his peers for one year.[117] Upon completion of disciplinary proceedings, the Council forwards disciplinary recommendations to the Authority of Heads of State and Government.[118] This solution has been thought to be helpful in terms of insulating judges from attempts by governments to remove them from office.[119]

As demonstrated above, the degree of JSG allowed by states in the area of removing judges varies. In some instances, judges of ICs are fully in charge of removals and hence the degree of JSG is high. In other instances, governments or the bodies composed of government representatives decide and judges of ICs are not given any role in this regard. In mixed models, governments or political bodies can remove a judge, but only if the removal is requested or recommended by national and/or international judges.

There are few, if any, known instances of judges being removed or even disciplined through the above-described procedures. The empirical study by Terris *et al* suggests that

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[114] Protocol on the Tribunal in the Southern African Development Community, Art. 11. This tribunal was de facto suspended.

[115] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006), ECOWAS Official Journal, Vol. 49 (2006), Art. 1; Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 5 (1) (2).

[116] The Chief Justices may be represented by the Judges of the respective Supreme Courts. Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 6 (3).

[117] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006), ECOWAS Official Journal, Vol. 49 (2006), Art. 2 (2); Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 6 (1) (2).

[118] Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 35 (2) (3).

[119] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *supra* note 68 at 759-760 (noting that the judicial council creates misconduct review procedures that insulate judges from attempts by governments to remove them from office).

JSG in this regard is largely informal. Even if the provisions are in place, there is a tendency not to publicize internal affairs, including disciplinary matters.[120] Terris *et al* further indicate: "These examples suggest how large a premium many judges place on keeping disciplinary matters internal and quiet. This is a matter of not only shielding individual colleagues from the glare of the public spotlight but also protecting the reputations of the institutions."[121] The risk of "corporate solidarity" is high[122] when disciplinary matters are left to judges. At the international level, this risk is even higher than it is at the national level because the power is vested in the specific IC, rather than a separate, external body, similar to national judicial councils that are normally composed of judges from different courts as well as non-judge members. Such a weak system of accountability is still defensible internationally since strong methods of oversight by external monitors would be vulnerable to abuse and lead to interference with judicial independence.[123]

D. Are International Courts Self-Governing? Variation across Courts/Areas of Decision-making and Emerging Trends and Patterns

Our study shows that each IC has a unique way of combining political and judicial elements in its procedures for selecting, promoting and removing judges, informed by its distinct legal framework and the political context in which it operates. There is considerable variation across ICs in terms of the degree of JSG that states provide them with. This is the case even with ICs in the same area of law. Several human rights[124] and criminal courts,[125] as well as economic integration courts,[126] have judicialized their procedures for selecting judges by establishing selection or screening bodies with senior national judges and former international judges among their members.[127] While these developments have been characteristically similar, we have observed differences in not only the composition and powers of the newly established selection/screening bodies under respective legal norms,

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[120] TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 205.

[121] *Id*.

[122] For such concern with regard to the ECJ, see JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION, 284 (Robert Badinter & Stephen G. Breyer eds., 2004).

[123] TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 207.

[124] The ECtHR Advisory Panel, established by the Committee of Ministers Resolution CM/Res(2010)26.

[125] The ICC's Advisory Committee on Nominations, envisaged by Art. 36 (4) (c) of the Rome Statute.

[126] ECOWAS Court's Judicial Council and CJEU's Advisory Panel.

[127] The CCJ allows the Commission to appoint judges, but the President of the Commission is appointed by the states. Members of the Central American Court of Justice shall be elected by the Supreme Courts justices of member states.

but also in their actual standing vis-à-vis political bodies and the influence they exert.[128] Other ICs operating in the same areas of law have been lagging behind in terms of engaging national and international judges[129] or have opted for a political screening body.[130] One commonality all ICs have is, however, that almost none of them can claim to be self-governing in this area of decision-making, based on our definition of JSG.[131] Normally, governments or organs of international organizations are the ones electing the judges of ICs, irrespective of the territorial reach of these courts and the area of law they operate in. Judges of all human rights and criminal courts and of most economic courts can elect their presidents among themselves. Judges of human rights and criminal courts and judges of European economic courts are vested with the power to remove their peers exclusively[132] or in conjunction with political organs.[133] Judges of a few courts can be removed by their states[134] or organs of international organizations.[135]

The above overview shows that there is variation in terms of the character and extent of judicial engagement across areas of decision-making within each court, with relatively limited participation of judges in the selection process, but greater judicial control over promotions, for example, to the position of court president, or over the removal of judges.

Since governments/political bodies maintain a strong grip over the selection of international judges, the level of JSG remains limited in starting international judicial careers.[136] Notwithstanding de-politicization and judicialization of procedures for selecting international judges in recent years, it is still fair to say that in this area, ICs are not, strictly speaking, *self*-governing, since sitting judges of these courts are not typically members of

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[128] Even the two European Advisory Panels, one of which seems to have inspired the other, are considerably different.

[129] The IACtHR does not have a panel similar to the one established for the ECtHR, but the Open Society Justice Initiative convened a panel of independent experts to offer assessments of candidates. This Panel was modelled on a similar initiative pioneered by the Coalition for the ICC.

[130] As an example, the UN Security Council screened nominees for the ICTY and ICTR. The Council was to select between 28 to 42 candidates out of those nominated for the posts at the ICTY and between 22 to 33 candidates for the ICTR. The ECtHR is unique as it has both expert and political screening bodies.

[131] See Part B of this article.

[132] The ECtHR, the CJEU, the EFTA Court.

[133] The ICC, the IACtHR.

[134] The Economic Court of the Commonwealth of Independent States and the Court of the Eurasian Economic Community.

[135] The Court of Justice of the Common Market for Eastern and Southern Africa; the East African Court of Justice.

[136] Cali and Cunningham in this issue label JSG in this area as “constrained”.

the bodies selecting new judges or screening candidates.[137] Sitting judges of the two European courts, particularly court presidents, are involved in selecting members of the expert bodies that assess the suitability of candidates, but cannot themselves be members of such bodies. Such bodies can only count as bodies of judicial *self-government*, if the meaning of *self* is stretched to cover the engagement of former judges of these ICs or if the meaning of *government* is expanded to incorporate the indirect involvement of sitting judges, for example, through helping select the members of screening bodies. Hence, JSG does not manifest itself at the international level in the same way it does at the national level, where judges are selected by judicial councils or by court presidents.[138] While national judges are elected to judicial councils by their peers to represent them, the members of the screening bodies are selected because of their expertise and therefore, they have no such representative function. Importantly, even if the establishment of screening bodies does not amount to the dramatic rise of JSG, the involvement of national judges as members of such bodies, which has become commonplace in and beyond Europe, still indicates judicialization of the process of selecting international judges. Overall, the development of selection procedures at each IC appears to be inspired by similar experiences of other ICs.[139] However, despite the similarity of purposes for which various selection or screening procedures have been established, each model emerges as unique, as a product of a specific political context.

The degree of JSG is overall higher in other areas of decision-making, such as promotions and removals of international judges, than it is in the area of selection. Judges of most ICs are able to elect presidents among themselves and also decide on the removals of their peers. This is not the case for all ICs, however. Governments are involved in selecting court presidents and in the processes of removing judges of some ICs. This means that some ICs display consistently low degrees of judicial self-government across all these areas of decision-making, while other ICs display relatively higher degrees.

To make sense of the current state of JSG at the international level, we identify two ideal types of ICs, in terms of the degree of JSG they enjoy. Minimal JSG entails complete governmental control over judicial careers and the operation of courts. Maximal JSG manifests itself in complete judicial control over the mentioned areas of decision-making:

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[137] The CCJ is a rare exception since its President is the Chairperson of the selection commission.

[138] It can be inferred from the limited presence of sitting judges that the screening bodies were clearly not modelled on judge-dominated national judicial councils. However, scholars have argued that states that established some form of judicial councils at the national level may be more inclined to accept de-politicization and judicialization of selection processes at the international level. Malleson, *supra* note 12.

[139] There is a direct reference to the CJEU panel in Judge Costa's letter to the member states' ambassadors, in which he proposed the establishment of the ECtHR panel. See Doc. 12391 6 October 2010, National procedures for the selection of candidates for the European Court of Human Rights; Committee on Legal Affairs and Human Rights Rapporteur: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party.

candidates answer calls issued by the court and compete for judicial posts; judges select and remove their peers and elect their own presidents, sitting either in plenary or in other configurations. If we placed actual ICs on the continuum between these two poles based on our examination of relevant rules and practices in all dimensions, they would be spread across the continuum. If we focused specifically on the selection of judges, the spread would be skewed towards the ideal type of minimal JSG, indicating that states seek to maintain control over the entry into an international judicial career. The recent judicialization of screening processes presents an interesting trend but does not dramatically change the overall picture of JSG.

The motivations of governments that design ICs, including the procedures governing the selection, promotion, and removal of judges, can be complex and varied. Governments may choose to transform highly politicized selection procedures, which, while guaranteeing the democratic legitimacy of judges, often raise questions about the qualifications of at least some of these judges and their capacity to make decisions independently.[140] By engaging senior national judges and former international judges and drawing on their expertise, governments may seek to reinforce the social legitimacy of ICs, re-assuring the court's audiences of the quality of its judges.[141] Even where governments de-politicize and judicialize these procedures at the level of formal rules,[142] they may still seek to control courts through informal channels. They may seek symbolic rather than substantive change in the procedures, only to create an appearance of objectivity and assure critics of the courts of the quality and independence of their judges. It is then highly probable that the bodies engaging judges will have limited formal powers and, even if supported rhetorically, their views will frequently be disregarded in practice. Differences in the motivations of governments may explain why the two expert panels established to serve the same goals of improving the quality of judges and of enhancing authority and legitimacy of these courts are so different in terms of their status and their position vis-à-vis governments/political organs.

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[140] Andreas Follesdal, *Independent yet accountable: Stress test lessons for the European Court of Human Rights*, 24 MAASTRICHT J. EUR. COMP. LAW 484–510, 507 (2017) (pointing out that while "democratic states must have enough influence in the selection process to ensure indirect democratic accountability," "democratic control is problematic insofar as it reduces the credibility of the ECtHR's independence"); Engel, *supra* note 44 at 453 (pointing out that democratic legitimation through the Parliamentary Assembly is "no reliable guarantee of the candidates' professional quality.").

[141] One study showed that the quality of judges is one of the major concerns (Başak Çalı, Anne Koch & Nicola Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUM. RIGHTS Q. 955, 967-968 (2013)).

[142] One recent study on delegation to independent regulatory agencies in the field of competition found that formal independence (whose many elements overlap with self-government) boost regulatory quality, while the formal political accountability does not have the same effect, see Christel Koop & Chris Hanretty, *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, 51 COMP. POLIT. STUD. 38–75 (2018).

The likelihood that governments will take the task of shaping the selection procedure seriously arguably increases when a) the court in question processes a large number of cases and issues demanding judgments, which governments cannot afford to ignore, b) withdrawal from the court's jurisdiction or non-compliance are too difficult or costly,[143] and c) the judges do not participate in deciding cases involving their states. The concern about the quality of judges may serve as a motivation for supporting additional filters, such as screening procedures, especially where it is thought that some governments are unwilling and/or do not make efforts to put forward sufficiently qualified candidates.

State control over the composition of the court (through appointments and re-appointments) appears to be the most crucial means for controlling judicial output. As far as the court has control over composition, influence through disciplinary measures, including removals, appears secondary. This explains the relatively limited degree of judicial engagement at the stage of selecting judges and greater willingness on the part of governments to relinquish control of promotions and removals.

We believe that JSG involves a particular way of structuring decision-making processes that can help insulate courts/judges from political influence[144] and create an institutional environment reinforcing decisional independence.[145] De-politicization and judicialization of selection processes, through engagement of screening bodies with national and former international judges as members, can help block manifestly incompetent candidates. Reputational costs associated with negative evaluations of candidates can discourage governments from making a choice based on loyalty rather than qualifications.[146] The establishment of such bodies can raise the bar over time in terms of the qualifications international judges are required/expected to have.[147] This could lead to prioritizing

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[143] Compare Weiler's version of exit (J. H. H. Weiler, *The Transformation of Europe*, 100 YALE LAW J. 2403,2423 (1991)).

[144] Paul Mahoney has viewed the introduction of an element of independent assessment of the eligibility and suitability of candidates at both national and international levels as an independence-enhancing measure. Mahoney, *supra* note 13 at 423.

[145] For the definition of decisional independence, see MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE 18 (2012).

[146] The Art. 255 Panel had already issued several negative opinions of CJEU candidates which nominating states respected, and many states even strengthened the procedural guarantees of screening candidates at the national level (Dumbrovský *et al.*, *supra* note 21), however, it has not prevented them from repeatedly proposing candidates found later unsuitable by the Panel again (see Slovakia which recently received a negative opinion by the Art. 255 Panel on three candidates for the EU General Court in a row).

[147] See detailed instructions on what kind of candidates they expect in the Activity Reports of the ECtHR Advisory Panel (https://www.coe.int/en/web/dlapil/advisory-panel) or the Art. 255 (CJEU) Panel (Panel Provided for by Article 255 of TFEU, THIRD ACTIVITY REPORT (2013), 17-21, https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf).

professional backgrounds that are associated with greater independence or greater efficiency, depending on the needs of the specific court. It needs to be kept in mind, however, that depending on what the governments' intentions are and how these intentions shape the relevant rules, the actual role of the JSG bodies may be more or less significant. Their effects on the quality or independence of judges should not automatically be assumed based on the formal transfer of powers.

E. Looking beyond Personal Self-Government

Our contribution covers only one dimension of judicial JSG – personal self-government. As explained by Kosař in the introductory chapter, JSG may manifest itself in a number of other areas of decision-making: administration of courts, handling financial issues or information, setting up educational programs, etc. While some of these dimensions, such as court administration or financial management,[148] are relevant at the international level in the same way as they are at the national level, others, such as the educational aspect are largely irrelevant, since international judges should already be sufficiently competent at the time of being elected. In this respect, among others, ICs resemble constitutional courts, as they are both supposed to serve specific functions that presuppose already highly qualified judges.

One interesting area to be explored in the context of ICs is what we label "implementation self-government", i.e. the participation of ICs in the execution of their judgments. Scholars have acknowledged limited enforcement powers and capabilities of ICs.[149] Forced by the failure of governments to implement non-monetary measures in response to its findings of violations, the ECtHR started specifying measures of implementation in its judgments. Such judicialization of implementation occurred, notwithstanding the alleged incompatibility of such interventions with the supervisory powers of the Committee of Ministers.[150] The IACtHR went even further than the ECtHR. It started issuing specific orders that it could subsequently use to follow up on a state's behavior and issue compliance reports (or supervisory rulings) carefully examining the steps taken.[151] As regards the implementation of CJEU judgments, the founding treaties were formally toothless, but the Treaty of Maastricht introduced possible penalty payments in the event of noncompliance, on which

[148] Theresa Squatrito, *Resourcing Global Justice: The Resource Management Design of International Courts*, 8 GLOB. POLICY 62–74 (2017).

[149] Shany, *supra* note 1 at 84.

[150] Under the ECHR, Art. 46 (2), the Committee of Ministers 'shall supervise the execution' of judgments. See for example, Markus Fyrnys, Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights, 12 GERMAN L. J. 1231 (2011).

[151] See for example, Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J 494, 500-502 (2011).

the CJEU itself decides, and the Lisbon Treaty further simplified the procedure for prompting states to comply with the CJEU judgments.[152]

F. Conclusion

Our research shows that each court is unique in terms of the forms and extent of participation of its judges in decision-making on judicial careers. There is a variation even across ICs operating in the same regions and fields of law. However, some broader patterns and trends emerge from the examination of relevant provisions and practices.

One key finding of our study is that while JSG manifests itself relatively strongly in the area of removal of international judges and that of promoting international judges, for example, to the position of court presidents, it is considerably limited in the area of selecting international judges. ICs are not, strictly speaking, self-governing in the latter area, since sitting judges are rarely members of the bodies that decide or advise on selecting new judges. Importantly, sitting judges of the CJEU and the ECtHR have been involved in establishing expert bodies that screen governmental nominees and/or in selecting the members of such bodies. Some of these judges have become members of screening bodies themselves, after leaving the respective ICs. These modalities of participation can count as manifestations of JSG at the international level, if the meaning of self is stretched to cover the engagement of former judges of these ICs or if the meaning of government is expanded to include the indirect involvement of sitting judges, for example, through helping select the members of the bodies that assess the suitability of governmental nominees.

The second finding of our research is that some ICs display consistently low degrees of JSG across the relevant areas of decision-making, namely, the selection, promotion and removal of judges, while other ICs display relatively higher degrees of JSG across the same areas. This means that if one places these ICs along the continuum, the former group of ICs will be concentrated somewhere towards the extreme end standing for political control, i.e. minimal JSG. The latter group of ICs will be concentrated somewhere towards the extreme end standing for judicial control, i.e. maximal JSG. It is possible for courts to move slowly from one extreme end to another. This is what has arguably been happening in the recent decade or so, with increased but still limited judicial involvement in the process of selecting international judges.

[152] Steve Peers, *Sanctions for Infringement of EU Law after the Treaty of Lisbon*, 18 EUR. PUBLIC LAW 33–64 (2012).

Annex: List of the international courts under study

African Court on Human and Peoples' Rights

Caribbean Court of Justice

Central African Economic and Monetary Community Court of Justice

Central American Court of Justice

Court of Justice of the Andean Community

Court of Justice of the Benelux Economic Union

Court of Justice of the Common Market for Eastern and Southern Africa

Court of Justice of the EU

East African Court of Justice

Economic Court of the Commonwealth of Independent States and the Court of the Eurasian Economic Community

ECOWAS Court of Justice

EFTA Court

European Court of Human Rights

Inter-American Court of Human Rights

International Court of Justice

International Criminal Court

International Tribunal for Former Yugoslavia

International Tribunal for Rwanda

International Tribunal for the Law of the Sea

Mercosur Permanent Review Tribunal

Organization for the Harmonization of Corporate Law in Africa Common Court of Justice and Arbitration

Southern African Development Community Tribunal

West African Economic and Monetary Union Court of Justice

WTO Appellate Body.

Articles

The Motivations of Individual Judges and How They Act as a Group

By Shai Dothan[*]

Abstract

States have a significant influence on the selection of judges to international courts. This raises the concern that judges will be biased in favor of their home states, a concern backed by some empirical research. To counter that danger, international courts usually sit in large and diverse panels. Scholars have argued that this gives judges only rare occasions to tip the balance in favor of their home states. The problem begins, however, when judges start forming coalitions among themselves, giving judges with national biases a practical possibility to change the result of cases. To assess the magnitude of this threat to judicial independence, the paper draws on decades of scholarship in the field of judicial behavior. By understanding how judges behave, scholars can come closer to deciphering the true impact of judicial selection to international courts on international judgments.

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A. Introduction

Mechanisms for judicial selection at international courts often allow states to participate in choosing the judges appointed to these courts. This may raise a concern about the independence of international judges: Even if judges are untouchable once appointed to the court, states can pick the judges that suit their ideological preferences or that are loyal to them. To some extent, this problem can be addressed by improving mechanisms for judicial self-government, for example by allowing current judges to intervene in future appointments to the court or, alternatively, by tightening the control of Presidents and legal staff on the work of the judges. Such mechanisms of institutional design can clearly make a difference, but they cannot completely dispel the risk that individual judges may be biased.

While international judges may not be individually independent, they regularly seat in panels with judges from other countries. Scholars have argued that large panels limit the danger of national biases because the chances that a single judge would cast the pivotal vote in favor of her country are really quite small. The problem is, however, that judges do not just cast their votes independently. When judges deliberate, they may form coalitions and influence each other, letting a committed national judge sweep the court in the direction desired by his country.

Furthermore, judges are not the only people that matter in international courts. Some courts, especially human rights and criminal courts, have a large professional staff that can significantly affect judicial decision-making. Those who control the staff may determine the direction of judicial decisions, and their biases may set the tone for the policy made by the court.

Finally, an international court is more than a sum of the people who work for it. It is an institution that develops a life of its own. The behavior of the court as an institution can be analyzed as a strategic attempt to avoid political backlash and to build the court's power over time. The judges in the court have an incentive to serve the institution that sustains their personal prestige and their ability to influence society. They would also adopt policies that suit the court's interest unconsciously, by imitating accepted judicial practices.

In order to investigate the intricate connections between the biases of individual judges and policy-making by the court as a whole, this paper will rely on insights from the field of Judicial Behavior. This large body of literature, written by lawyers and political scientists, can throw light on the way individual judges act together as a group. While much of this literature was developed to study national courts, many of its insights can be fruitfully applied to the study of international courts.

Part B investigates the biases of individual international judges. Part C uses insights from the research on Judicial Behavior to investigate how judges make collective decisions. Part

D explores the influence of other people besides judges on the decisions of international courts. Part E demonstrates how international courts act as strategic institutions. Part F concludes.

B. Why Judges are Different from Each other

I. Judicial Selection in International Courts

The existing empirical work on the behavior of international judges is mostly focused on the bias of judges towards their home states. This naturally raises the question of the level of involvement countries have in the appointment of judges to international courts. There is, in fact, great variation in this respect between international courts. Some courts allow states to select judges, while in others the decision is delegated to an international organization that is somewhat independent from states.[1]

In the International Court of Justice (ICJ), states create the lists of nominations, but judges are approved by the United Nations General Assembly.[2] A similar rule applies in the International Criminal Court (ICC), in which the deciding body is the Assembly of State Parties.[3] Judges in the World Trade Organization Appellate Body (WTO AB) are appointed by the Dispute Settlement Body itself.[4]

In contrast, two of the most influential regional courts used to present a much tighter involvement of states in appointing judges, before structural changes altered that condition significantly. In the European Court of Justice (ECJ), every government had a right to appoint a national judge. While theoretically appointments required the "common accord" of all governments,[5] the choices of the states were traditionally almost always respected.[6] In the European Court of Human Rights (ECHR), every member state could suggest three candidates out of which the Parliamentary Assembly of the Council of Europe chooses one.[7] To reduce the involvement of states in the selection of judges in the ECHR and the Court of Justice of the European Union (CJEU), as it is now called, new procedures were implemented.

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[1] *See* Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L. L. 387, 401–402 (2009)

[2] Statute of the International Court of Justice, Article 4.

[3] Rome Statute of the International Criminal Court, Article 36.

[4] Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17(2).

[5] The Treaty on the Functioning of the European Union, Article 253.

[6] *See* Voeten, *supra* note 1, at 401.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 20, 22.

The Lisbon Treaty of 2009 fundamentally changed the self-government of the CJEU regarding the appointment of new judges. CJEU judges now must pass an advisory panel, known as the Article 255 Panel. The composition of the Panel is set following a proposal by the ECJ's President who also proposed the operating rules of the Panel. The proposals of the President were to a large extent followed. This move increased significantly the ability of CJEU judges, particularly the President, to govern themselves with less external influence from the states. The Panel has in fact found several judges proposed for the ECJ General Court to be unsuitable, leading to the proposal of new candidates by the states.[8] States probably realize that in order to avoid a rejection of their candidates, which they can only overturn by a unanimous decision of the states, they need to exercise special caution in choosing candidates that the Panel is likely to find suitable. This implies that the ability of states to select judges who are fundamentally biased towards their own interest is now significantly curtailed.

In the ECHR, a similar, if perhaps less extreme, shift in the self-governance of the judges on appointments has occurred following the establishment of an Advisory Panel of experts to monitor the election of candidates for a judicial position.[9] The President of the ECHR is consulted by the Committee of Minister on appointments to the Panel, giving the President a strong grip on the panel and by extension some influence on the appointment of ECHR judges. Views on the actual effectiveness of the panel in ensuring candidates are chosen based on legal expertise and not on political grounds have been mixed. Furthermore, the panel has only an advisory role and its advice has sometimes been ignored in the past. Nevertheless, the Panel's review of the candidates' CVs may have already influenced the rejection of candidates to the ECHR.[10]

The analysis so far suggests that states have some control over the selection of judges, but this level of control differs in different international courts and is often different in the same court across time. The more states control the selection of judges to international courts, the greater the resulting risk of national influence on the judge's future decisions. Clearly, people who are interested in preserving the impartiality of international courts realize that and push for greater self-governance of international courts on their appointment process.

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[8] *See* Christoph Krenn, *Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success*, in this issue.

[9] Following Resolution CM/Res(2010)26 on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

[10] See Basak Cali & Stewart Cunningham, *Judicial Self Government and the Sui Generic Case of the European Court of Human Rights*, in this issue.

II. National Bias

Why would we suspect an international judge is suffering from a national bias? The literature suggests four main reasons:

1. *Psychological* – Some judges are national patriots. They may be inclined to decide in favor of their country for reasons of loyalty and national pride.

2. *Economical* – Judges may want to curry favor with their country in the hope of getting some benefits in return. These benefits may include a support for reappointment, if such is possible, or a comfortable position in their country once they retire from the international court.

3. *Selection effect* – Judges may be selected because they hold certain political and ideological positions or because they are committed to certain legal dogmas. A judge with this incentive will rule a certain way only because she believes that is the right legal decision. But this would suit the interest of the state, which selected the judge exactly because of her specific beliefs about the law.[11]

4. *Cultural* – Judges who were educated and gathered legal experience in their own country may be naturally inclined to see eye to eye with their country on many legal issues.[12]

There may be procedural solutions that could reduce every one of these biases. To reduce the psychological bias, judges are committed to complete impartiality by the court's rules. In the ICJ, for example, every judge has to make a "solemn declaration in open court that he will exercise his powers impartially and conscientiously".[13] To reduce the economic bias, some international courts, for example the ICC, appoint judges for a non-renewable term.[14] The ECHR even shifted from renewable to non-renewable terms.[15] To reduce the selection effect, international bodies are often involved in the process of appointing the judges as shown above. The cultural bias may be somewhat mitigated by preferring judges with a more international profile, such as judges who studies in elite institutions abroad.

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[11] *See* Eric A. Posner & Miguel F. P. de Figueiredo*, Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 608 (2005).

[12] *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 420 (2008).

[13] Statute of the International Court of Justice, Article 20.

[14] Rome Statute of the International Criminal Court, Article 36(9)(a).

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 23(1) was amended by Protocol No. 14.

It is difficult to tease out from data about judicial votes which explanation accounts for the national bias of international judges.[16] Nevertheless, some scholars have found creative ways to get around this problem. For example, a finding that ECHR judges are more likely to decide in favor of their governments if they can expect reelection instead of facing retirement, suggests that economic factors may be playing a significant part in the judges' decisions.[17]

Regardless of the underlying reasons for national bias, there is conclusive empirical evidence that international judges are in fact systematically biased in favor of their homelands.[18] The only question is, does this bias actually affect the result of their judgments? International courts deliberately include representatives from a variety of countries and they sit in large panels, which usually means that the chances of a biased national judge to serve as the pivotal vote are very small indeed.[19]

It seems that the architects of international courts assumed that judges will suffer from a national bias, even if they didn't welcome this behavior. To counter that, they made sure that there will be plenty of other judges from different nationalities making the critical decisions. The general expectation that national bias cannot be erased may even be responsible for the practice of ensuring judges from all the involved states are present when the ICJ deliberates[20] and for the rule that a national judge will be added to every Chamber or Grand Chamber in the ECHR.[21] If national judges are biased in any case, the best way to level the playing field is to ensure that they will take part in every decision, but they will be properly balanced by judges with other nationalities.

III. Coalitions Between Biased Judges

If every judge is independently biased in favor of her home country, the policy implications of this bias are minimized thanks to the careful design of international courts. The problem begins when biased judges form coalitions and gain the power to tip the scale in favor of a certain state or a certain legal argument.

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[16] *See* Posner & Figueiredo, *supra* note 11, at 608.

[17] *See* Voeten, *supra* note 12, at 427.

[18] *See id.* at 425; Posner & Figueiredo, *supra* note 11, at 624.

[19] *See* Voeten, *supra* note 12, at 426.

[20] Statute of the International Court of Justice Article 31

[21] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 26(4).

Coalitions between judges can be formed in at least three ways:

1. Judges are biased not just in favor of their own country, but also in favor of other countries that are either connected to it or similar to it.

2. Judges from certain countries systematically favor certain legal or ideological positions that are common both to them and to judges from other countries.

3. Judges do not decide independently; instead they influence each other and carry other judges with them towards making a certain legal decision.

The first two possibilities are not coalitions of judges who deliberately collaborate with each other. They are groupings of judges who happen to think or act in a similar way. The paper addresses these two possibilities before focusing on potential collusion between judges.

There is some evidence that judges in the ICJ are systematically biased in favor of countries that are similar to their own across a series of economic, political, and cultural dimensions.[22] The concerns raised by this possibility are obvious. Even if judges do not influence each other, if a contentious case is heard by ICJ judges who mostly come from countries similar to one of the sides of the dispute, this side automatically gains an unfair advantage.

Judges may also form a systemic bias that doesn't favor a specific state but rather a specific judicial policy. Scholars have noted, for example, that ECHR judges from former socialist countries are more activist than other ECHR judges. They are more likely to find violations against their home countries as well as against other former socialist countries.[23] This type of bias, again, may raise a concern about the impartiality of judicial panels. A panel staffed with judges from a certain background may end up being systematically more likely to find violations compared to a panel staffed with judges from other countries.

Yet these two possibilities are still less dangerous to the impartiality of judicial panels than the potential risk of judges influencing each other. If the panels are large and diverse enough, the risk of forming a majority among judges which are all biased in the same direction can be minimized. But if a single biased judge holds the power to sway with her other members of the panel, diversity would not help. To investigate the magnitude of that risk, a better understanding of the motivations of judges is needed. This is the topic investigated by the field of Judicial Behavior, as the next part explains.

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[22] *See* Posner & Figueiredo, *supra* note 11 at 623–624.

[23] *See* Voeten, *supra* note 12 at 431.

C. What Happens When Different Judges Decide Together

Studies of Judicial Behavior developed primarily to explain the behavior of national judges, but they are increasingly applied to international courts as well. The most basic division of theories about Judicial Behavior speaks of three distinct groups of models:

1. *Legal models* - Judges simply uphold the law in their judgments.

2. *Attitudinal models* - Judges follow their own policy preferences in their judgments.

3. *Strategic models* - Judges try to promote their policy preferences strategically, by taking into account the expected decisions of other judges and changing their own decisions accordingly, to reach a certain policy goal.[24]

Naturally, when the main concern is the bias of judges and their influence on each other, there isn't much to say about judges that fit the legal model. These judges are not biased by political concerns or policy goals. They simply do their best to decide according to the law. While it is possible that legalist judges would have a distinct vision of the law to which they are committed[25] and it is also possible that this vision would correlate with their home countries or the countries where they were educated, these judges, by definition, are not influenced by other judges and will not change their behavior in the hope of influencing others.

Attitudinal judges may be biased in favor of their country, but they are not affected by other judges. If every judge on the panel has only a miniscule chance to be the pivotal vote, national bias by attitudinal judges doesn't pose a real danger. In contrast, strategic judges may affect each other and form coalitions. If such judges are nationally biased, they may very well determine the result of the case in favor of some states and to the detriment of others.

To assess the danger of influence by biased judges, the analysis should start with understanding the policy goals of judges and how these policy goals affect their decisions on the bench. Complicated empirical tests have been devised by the literature to distinguish the actual ideological commitments of judges. Only by understanding the ideologies and behavior of individual judges can their behavior as a group be thoroughly understood.

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[24] *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 44–114 (2002).

[25] *See* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 485–486 (2001).

I. Attitudinal Models

The attitudinal model takes judicial decisions as sincere expressions of the judges' policy goals. According to this model, if the policy goals of judges can be discovered, their future decisions could be predicted with some accuracy.

Under certain circumstances, the identity of the appointing authority can serve as an excellent proxy for the judge's policy goals, as can aspects of their professional experience and social characteristics. However, the attitudinal model uses these parameters only as proxies to discover the policy goals of judges, not as instruments for predicting directly future judicial decisions. In contrast, there are scholars who use background characteristics of judges as a direct tool to predict judicial behavior.[26]

Judicial background theories are agnostic about what judges are trying to achieve in their judgments. They only claim that certain facts about the background of the judges correlate with certain judicial decisions. The nature of this paper's inquiry is more ambitious because it tries to link judicial behavior—individually and in a group—with hypotheses about judicial policy goals, which are made based on observable facts.

The attitudinal model is committed to the idea that judges have consistent policy preferences that shape their decisions.[27] They do not change their preferences because of deliberation with their peers.[28] If judges believe in a wide protection of freedom of speech, for example, their judgments will consistently grant such a protection. In fact, judges can be arranged across a scale according to their policy views, for example from the most economically liberal judge to the most economically conservative judge.[29] Judges may also be arranged across several policy dimensions at the same time. A line would suffice to arrange judges across one policy scale. Two policy scales would require a surface and three scales can be described on a three-dimensional space. More scales can be added on to that, even if they cannot be modeled by a static physical depiction.[30]

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[26] See examples for factors studied by theories on judicial background at: Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions 1946–1978*, 75 AMER. POL. SCI. REV. 355, 355 (1981); Joel B. Grossman, Joseph Tanenhaus, *Toward a Renascence of Public Law in* FRONTIERS OF JUDICIAL RESEARCH 3, 14 (ed. Joel B. Grossman, Joseph Tanenhaus, 1969).

[27] *See* SEGAL & SPAETH, *supra* note 24 at 86.

[28] *Cf.* J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 AMER. POL. SCI. REV. 43, 44 (1968). Howard argues that judges change their opinions following deliberations. For attitudinal responses to this argument see Nancy Maveety & John Anthony Maltese, *J. Woodford Howard Jr.: Fluidity, Strategy and Analytical Synthesis in Judicial Studies in* THE PIONEERS OF JUDICIAL BEHAVIOR 228, 234–237 (ed. Nancy Maveety, 2003).

[29] *See* GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED – PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY 11 (1974).

[30] *See id.*. at 18–19.

1. Proving that judges are attitudinal

There are several problems with proving that judges behave according to the attitudinal model. The first problem is that this model may end up being inherently circular. If judges behave sincerely the way they think they should behave and if the only way to decipher how judges think they should behave is to look at their actual behavior, the attitudinal model collapses into a tautology.[31]

The literature has come up with ingenious ways to solve the circularity problem. One way is to contrast the votes of judges in one period with their votes in another period. This method can help form testable hypotheses about judges' behavior based on their conduct in the past, even if it doesn't reveal the underlying ideology that motivates judges to behave a certain way rather than another.[32]

A more sophisticated method involves checking for correlations between the votes of judges on one policy issue and their votes on another policy issue. One can hypothesize, for example, that judges who protect the right of criminal defendants would also act in favor of the weaker party in economic disputes. If a correlation between judicial behavior in these two fields is proven, it may reveal something about the nature of the judges' ideologies.[33]

The most accurate way to test the attitudinal model, however, is to form a hypothesis about the judges' future decisions based on some exogenous indication of their policy views. Scholars have used newspaper editorials about judges' ideological commitments—published before these judges were appointed—to make such testable hypotheses.[34] Nevertheless, the most common way to hypothesize about the content of judges' future decisions is to examine the political affiliations of those who appointed them.[35] In a way, the literature on political decisions of international judges does exactly that. It looks at the judges' country of origin as a proxy for their political commitments and finds that judges are indeed biased in favor of their homelands.

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[31] *See* SEGAL & SPAETH, *supra* note 24 at 320.

[32] Id. at 320–321.

[33] *See* Sheldon Goldman, *Voting Behavior on the Unites States Courts of Appeals 1961–1964*, 60 AMER. POL. SCI. REV. 374, 379–380 (1966).

[34] *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AMER. POL. SCI. REV. 557 (1989).

[35] *See* RICHARD A. POSNER, HOW JUDGES THINK 20–22 (2008) (demonstrating how this investigation can be conducted in different ways and in varying levels of complexity).

2. Distinguishing attitudinal and other judges

Another problem with the attitudinal model involves distinguishing its predictions from the other models of judicial behavior. If the judge's policy goals in a certain case are perfectly in line with the content of legal doctrine, legalist judges and attitudinalist judges would behave exactly the same way and be indistinguishable.[36] If the best strategy is simply to act according to one's sincere preferences, attitudinal judges and strategic judges would also behave the same way.[37]

The crucial distinction for the purpose of this paper is that between attitudinal judges and strategic judges. Attitudinal judges may be biased, but they cannot form coalitions that would determine the result in diversified panels. Strategic judges, in contrast, may form coalitions and sway the result in favor of their countries. Distinguishing attitudinal and strategic judges is so difficult because the only thing that would make a strategic judge behave differently from an attitudinal judge with the same policy goals is the environment they operate in. The strategic judge must find circumstances that make it beneficial for her to behave in a sophisticated way instead of sincerely following her preferences just like the attitudinal judge.[38] The researcher can make conjectures about the conditions that would make a strategic judge shift from sincere to sophisticated behavior, but if no evidence for sophisticated behavior is found, it doesn't prove the judge is not strategic. It may just as well indicate that the conditions are not such that would trigger sophisticated behavior by this type of strategic judge. In other words, maybe the conjecture is simply wrong.[39]

3. Role perceptions

Even if valid hypotheses about attitudinal behavior are tested and confirmed and the possibility of strategic behavior is convincingly ruled out, judges may not behave as attitudinalist all the time. A judge with firm ideological commitments may make a conscious decision not to follow them. This fact may actually reduce the danger of national bias if judges decide to replace their pursuit of policy goals with adherence to the law.

The literature has struggled with the task of distinguishing between a judge that does not have clear preferences and a judge that has a policy preference, but decides not to follow

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[36] *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158 (1998).

[37] *See* Virginia A Hettinger, Stefanie A. Lindquist, Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AMER. J. POL. SCI. 123, 125–126 (2004).

[38] *See id.* at 126.

[39] *See id.*, at 135.

it. Scholars have managed to isolate the willingness of a judge to follow her policy preferences and called it the judge's "role orientation".[40]

If the judge believes, for example, that her role is to decide cases in line with previous decisions of the same court, she may not vote in favor of her state even if she holds the same policy views of the state on the matter. A different judge may believe that it is part of his role to follow his policy preferences and will end up deciding differently from the first judge even if their policy preferences are in fact exactly the same. The factor that leads two judges with the same policy views to decide differently may simply be their "role orientation"—their beliefs about the legitimacy of following their preferences in their decisions.

The risk of biased decisions increases if judges think it is part of their role to follow their policy preferences. This risk may increase even further if judges believe their role is to promote their preferences strategically, which would make it possible to form coalitions of biased judges as discussed below.

4. The influence of doctrine

An attitudinal judge may have a role orientation that permits her to follow her preferences in her judgments, but still show some respect to legal doctrine. Judges can follow their policy preferences when legal doctrine is vague, ambiguous, or incomplete enough to leave room for judicial discretion. Not every case leaves room for judicial discretion, and even when judicial discretion does exist its boundaries are always limited.

American Legal Realists have mentioned three reasons for the existence of judicial discretion: (1) The law is indeterminate: it doesn't form only one legal solution because of the inherent ambiguity of language and because a text cannot foresee and address all the possible future circumstances[41] (2) Often there are several conflicting rules relevant to the same problem[42] (3) Applying rules to factual situations requires construing the facts according to legal categories, an act that involves discretion because the facts can be classified in several ways.[43]

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[40] *See* James L. Gibson, *Judges' Role Orientations, Attitudes and Decisions: An Interactive Model*, 72 AMER. POL. SCI. REV. 911 (1978).

[41] *See* H. L. A. HART, THE CONCEPT OF LAW (1961) 124–126.

[42] *See* Brian Leiter, *Legal Realism, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 266 (Dennis Patterson ed., 1996); Hanoch Dagan, *The Realist Conception of Law*, 57 U TORONTO LJ 607, 614–615 (2007).

[43] *See* Leiter, *supra* note 42 at 266–267; Dagan, *supra* note 42 at 616.

Some scholars have argued that international law involves an even greater discretion than domestic law because it harbors no illusions of coming together to form one harmonious system. In international law, every rule is motivated by contradictory goals. Therefore, even if only one clear rule applies, it is always based on reasons that conflict with each other. Because following the rule isn't preferable to following any of the contradictory reasons behind it, judicial discretion always remains.[44]

Other scholars disagree. They claim that in some cases international law is clear and doesn't leave any room for judicial discretion.[45] Such cases are known as "easy cases". A common example is the number of permanent judges at the ICJ. This number is 15 according to article 3(1) of the court's statute—a provision that leaves no room for interpretation.[46]

Both sides of the debate would probably agree that courts are destined to deal with cases that are more complicated than most manifestations of the law. Cases that reach a court usually get there because parties disagree about the proper legal interpretation. In contrast, in most cases people understand the law and settle their disputes in accordance with its provisions.[47] Nevertheless, even in cases where judicial discretion exists, it isn't absolute. The law draws certain boundaries that judges cannot cross without transgressing the limits of the text.[48] Therefore, even an attitudinal judge is limited by the provisions of the law and cannot fully surrender to her national bias.

So much for the ideal view of judges who feel committed to follow the law even if it conflicts with their preferences. But what if the judge doesn't mind overstepping the boundaries of the law so long as she isn't caught? Or what if the judge doesn't know the full details of the law and needs to be reminded of her duty? These possibilities give rise to a curious phenomenon scholars call "the whistleblower effect".

The whistleblower effect is one potential explanation for an empirical finding that arises again and again in judicial panels: Judges tend to vote less according to their preferences when they sit with judges who hold different preferences. This finding remains even if the judge with the opposing preferences is a minority vote that cannot affect the result. According to those who believe in the whistleblower effect, judges act in this way because

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[44] *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 590–591 (2005).

[45] *See* EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 21–22 (2014).

[46] *See id.* at 21.

[47] AHARON BARAK, JUDICIAL DISCRETION 58–66 (1987) (Hebrew).

[48] *See id.* at 35–41.

they are willing to ignore their preferences when another judge proves to them that their preferences contradict legal doctrine.[49] The whistleblower judge is motivated to investigate legal doctrine and confront her colleagues when the law is on her side. The other judges become informed of the legal situation and cannot hide the fact that their preferences contradict the law. At least some of the time, they would give up their preferences and conform to their legal obligations.

The upshot of all this is that even attitudinal judges will not always follow their preferences and are not always susceptible to national bias. If judges believe their role mandates that they behave differently then what their policy goals dictate, they may do so. If an attitudinal judge is confronted with doctrine that clearly opposes her ideology, she may decide to conform to the doctrine. Furthermore, even if all that fails, attitudinal judges cannot collaborate with other judges to form a majority that suits their biased view. This means that a diverse panel effectively remedies the problem of national bias among attitudinal judges. But that cannot be said about strategic judges, the subject of the next sub-part.

II. Strategic Models

There are multiple ways to think about strategic judges. Strategic models—sometimes referred to as models of the positive political theory of law[50]—are only committed to the idea that judges act rationally to reach certain goals and make choices that depend on their expectations about the behavior of other actors as well as the institutional settings in which they act. Unlike the attitudinal model, which is committed to the idea that judges pursue policy, a strategic judge may pursue multiple possible motivations in conformity with these guidelines.[51]

If a strategic judge pursues a certain policy, for example if she harbors a bias in favor of her state, there must be at least some situations in which her decision would not sincerely

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[49] *See* Cross & Tiller, *supra* note 36 at 2174. Another potential explanation for the same empirical finding is that even a minority judge can threaten to write a dissent which would increase the chances of appeal or legislative overruling and the other judges act strategically to preempt this by changing their judgments, *see id.* at 2173–2174. An alternative reason for why judges tend to lower their ideological commitments when sitting in a panel with judges who have other attitudes could be that judges negotiate a compromise to align the decision to the preferences of all panel member. Judge may even have a long-term strategy and consider the willingness of their panel members to compromise as part of an ongoing relationship where concessions are repaid in future cases, see CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 64–66 (2006).

[50] *See* POSNER, *supra* note 35 at 29.

[51] *See* Lee Epstein, Jack Knight & Andrew D. Martin*, The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 798 (2003).

reflect her policy preference. Instead, she would act strategically to promote that preference, changing her decision conditioned on the expected behavior of others.

Imagine a simple example: A judge who prefers result A over result B and result B over result C. If this judge were attitudinal, her vote would be clear: she would always decide for result A. If this judge is strategic, however, she may sometimes make a compromise. She could vote for result B if she thinks this would affect other judges on the panel and lead to a majority judgment upholding result B, instead of result C—her least favorite outcome.[52]

Judges may also think strategically about what happens after they issue their judgment, for example whether their judgment will be complied with or not. This possibility involves a collective strategy of the court as a whole and will be discussed in Part E below. For now, the strategic choice of judges is completely intuitive: A judge may decide to put forth exactly the position she prefers, or she may offer some compromise solution that may be accepted by other judges in the panel and become a binding judgment.

To make this analysis more concrete, assume a case in the ECHR about a salient political issue such as prisoners' right to vote. If the United Kingdom is accused of violating the right to vote, as it was in the famous *Hirst* case,[53] theory suggests there is some possibility that the British judge will be biased and prefer to allow a blanket ban on prisoners' voting. In a large panel of seven judges (Chamber) or seventeen judges (Grand Chamber), the chances that the British judge will cast the pivotal vote are very small indeed. But if ECHR judges are strategic, the British judge may offer a compromise position: for example, requiring countries to allow only prisoners with very short sentences to vote. If the British judge promises to join a majority opinion which includes this concession, other judges may be convinced and decide to tone down their judgment and accept this deal. Other judges may want to avoid a dissent that can damage the legitimacy of the judgment or they may view the compromise position as an easy focal point they can agree on, which explains their willingness to negotiate a bargain. While in this case the biased judge would not get a decision that fully conforms to her preferences, she would change the majority judgment, and with it the law.

How dangerous is this possibility? It all depends on how much leverage one judge has on the other judges in the panel. Can one judge change the behavior of many other judges? Do some judges have more power than others? Can judges make promises about their future behavior to increase their bargaining power in specific cases? These possibilities will be discussed in the following sub-parts.

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[52] See Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625, 632; LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 1–9 (1998).

[53] Hirst v. The United Kingdom (No. 2), judgment of 6 October 2005, 2005-IX EUR. Ct. H.R. 187.

1. Small groups dynamics

The section of Judicial Behavior studies that deals with small groups dynamics is dedicated to investigating how judges can shape the behavior of other judges. Studies in the field have checked, for example, how "voting blocs"—groups of judges who vote together—emerge and how susceptible they are to influence by other judges on the same panel.[54]

In order to gauge the danger that a biased national judge would carry enough judges from the minority voting block to form a new majority and shape the result, more must be known about the small groups dynamics in international courts. Relevant questions include: whether judges that form a substantial majority can still be convinced to alter their decision by minority judges? are there specific judges on the panel that usually decide together and form a more stable voting block? and most importantly: do some judges have a greater influence on the panel than others? This last question naturally calls for an investigation of who are the leaders among international judges.

2. Patterns of leadership

Scholars have discovered that in some settings judges with more prestige and experience write more opinions and receive greater support for their positions.[55] This result is hardly surprising. Everyone who reads judgments can easily discern that some judges have a much greater influence than others on the practice of their court and on the development of legal doctrine. The question is who are these judges?

An obvious place to look would be the judges' backgrounds. Judges with a stronger international reputation or more legal and judicial experience, may naturally be more powerful than other judges. The presidents of international courts have a special role in this regard. Beyond the formal powers which their title entails, it also puts them in a special position of leadership within the court. Scholars who investigated types of leadership of Chief Justices in the United States Supreme Court argued that to lead effectively, the Chief Justice has to combine the capacity to guide other judges in fulfilling their tasks with the social skills necessary to foster harmony on the court.[56] This clearly applies to presidents of international courts as well. Presidents who possess these two qualities will exert a large influence on the practice of their courts.

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[54] *See e.g*. S. Sidney Ulmer, *Toward a Theory of Sub-Group Formation in the United States Supreme Court*, 27 THE JOURNAL OF POLITICS 133.

[55] *See* Thomas G. Walker, *Behavioral Tendencies in the Three-Judge District Court*, 17 AMER. J. POL. SCI. 407 (1973).

[56] *See* David J. Danelski, *Social Psychology and Group Choice*, *in* THE PIONEERS OF JUDICIAL BEHAVIOR 248, 252 (Nancy Maveety ed., 2003).

This implies that powerful judges, and especially presidents, could have a disproportionate weight within their panel and change the result even against the resistance of several less powerful judges. If an especially powerful judge suffers from a national bias, there is a risk that the court's decision will be biased as well.

One could suspect that more powerful countries may be able to select more powerful judges. This problem may arise because a richer and more populated country may have access to better judicial candidates. A more ominous possibility is that judges would be able to stake the reputation and the clout of their home countries behind their legal position. If a judge from a powerful country threatens that her country will fail to comply with certain judgments, for example, her threat may carry some weight. To the extent that this danger occurs in international courts, it significantly increases the risk of biased results that favor the strongest countries.

3. Long-term strategy

A judge can try to convince other judges to accept her point of view. She can argue with judges on the panel, try to cajole them, and offer compromise solutions that may be acceptable to them. But can she offer other judges something in return for their help? If judges are not only concerned about the result of a specific case but about their long-term ability to sway the court in the direction they choose, they may strike deals with other judges. A judge could agree to vote with her colleague on one issue in exchange for the colleague's willingness to compromise in future cases. Furthermore, judges who think about the long-term may be motivated to preserve the credibility of their threat to issue a dissenting opinion. This means that a judge could issue a dissent knowing that she skips an opportunity to reach a compromise and allows a decision unfavorable to her to pass, only in the hope of getting more leverage vis-à-vis other judges in future cases. Qualitative studies of judicial behavior indicate that such complicated forms of strategy are indeed possible.[57]

To the extent that international judges practice such long-term strategy, the risk that a committed judge with a national bias will get her way some of the time looms even larger. This judge may have to compromise in some cases to build goodwill with her colleagues. She would have to build a reputation for resolve in other cases. But in issues that are really important to her, a judge with a long-term strategy may force the court to steer in a certain direction.

[57] *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 90 (1964).

D. People Who Are Not Judges

I. Legal Staff

It is easy to adopt the misleading view that judges are the only people who really matter in international courts. After all, judges are the ones who sign judgments, and therefore it is natural to assume that it is only judges who make important policy decisions. But this imaginary view is probably mistaken with regards to many international courts.

Scholars have noted that the ECHR has a very influential legal staff, partly because judges who are not proficient in English and French, the two official languages of the court, must rely very closely on staff members.[58] In many international courts, especially criminal courts, the staff can number hundreds of experienced professionals.[59] It is naïve to think that these experts do not affect judicial policy.

To the extent one believes the legal staff is diverse and unbiased, the substantial impact of this staff may be a blessing. It could mitigate the influence that biased judges have on the practices of the court. But if the legal staff is hierarchically controlled, the people on the top of the pyramid may form a danger of an entirely different magnitude. In the ECHR, for example, all the staff members answer directly to the Registrar. The Registrar, in turn, is under the authority of the court's President. If either the Registrar or the President are biased, this bias could echo throughout the entire legal staff.

If the staff or the people controlling it are biased, they may direct the entire court to suit their preferences. This suggests that empirical research should not stop at investigating the selection of international judges. It should also study the selection and promotion of other legal staff within international courts, and it should put special emphasis on the positions in the court that control the legal staff.

II. Lawyers and NGOs as Repeat Players

Courts do not work in isolation. They constantly interact with lawyers who bring cases to the court, argue before it, and significantly affect the content of its decisions. Research has shown that many of the lawyers who appear before international courts are "repeat

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[58] *See* Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 26–31 (2005).

[59] *See* Stéphanie Cartier & Cristina Hoss, *The Role of Registries and Legal Secretariats in International Judicial Institutions, in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 712, 713–14 (Cesare P.R. Romano et al. eds., 2013).

players"—they litigate before the same court numerous times.[60] These repeat players gain legal expertise and connections that give them a unique influence on the policy made by the court. Just like with the legal staff on the court, this influence may either mitigate or exacerbate the biases of the judges depending on the nature of the legal community surrounding the court.

There are also Non-Governmental Organizations (NGOs) that have made it their explicit goal to shape policy-making by international courts. Such NGOs render crucial help to international courts by providing them with cases to decide and with legal arguments which they submit as litigants or friends of the court. They can also help international courts' public relations and assist them in monitoring compliance with their judgments.[61] In return, NGOs get a real chance to shape the behavior of the court, or at least to change the long-term repercussions of the court's judgments on society, after these judgments are issued.

There is a potential danger in subjecting international courts to substantial influence by NGOs. Even collaborating with NGOs in the struggle to ensure compliance with judgments may be dangerous because it empowers NGOs to use potent reputational sanctions against certain countries. Some may fear that these reputational sanctions will be used unfairly. However, empirical research suggests that, at least in some settings, these fears are unmerited. NGOs that assist the ECHR in enforcing its judgments tend to focus their energies on the most severe violations and the most legally important cases. They do not pick on states that are considered by the international community to have weak reputations and focus instead on countries with good reputations that are expected to work hard to preserve them and to change their practices for the better following the efforts of NGOs.[62] Of course, these findings do not necessarily apply to all international courts. They only suggest that to make a true assessment of the combined impact of international courts and the civil society organizations that cooperate with them, careful empirical study is needed.

E. From Individuals to the Court

So far, this paper focused on the behavior of individual judges, their biases, and their interactions with each other. But there is another way to investigate judicial behavior: studying the strategic behavior of the court as a whole.

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[60] *See* Antoine Vauchez, *Communities of International Litigators*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 655, 657 (Cesare P.R. Romano et al. eds., 2013).

[61] See Shai Dothan, *Luring NGOs to International Courts: A Comment on CLR v. Romania*, 75 HEIDELBERG J. INT'L L. 635, 642–650 (2015).

[62] *See* Shai Dothan*, A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States,* 27 DUKE J. COMP. & INT'L. L. 141 (2017).

Judges are human beings, but they do not act as individuals. They are selected for a certain purpose and undergo decades of education and training. They are charged with fulfilling a very specific task under a complicated set of procedural constraints.[63] The institutional structure that judges are embedded in affects the way they decide cases, even the way they think.[64] Judges may not be aware of the goals of the institution they work in, and still be pressured in numerous subtle ways to serve these goals.

Take a simple example: Certain times in a court's life call for presenting a united front and suppressing dissents. When the court is under attack or when it is faced with extremely controversial issues, it needs to project unity in order to garner compliance and to preserve its legitimacy. This doesn't mean that individual judges suddenly start to think about controversial issues the same way. In fact, these may be exactly the issues that divide the judges just like they divide society.[65] But it does mean that judges will be subjected to significant social pressures to silence their opposition. The result: The court as a whole will tend to issue more judgments unanimously.[66] Scholarship on the United States Supreme Court indicated that the Chief Justice is usually especially responsible for the pressures exercised on judges to suppress dissent.[67] The Presidents of international courts, because of their special position of leadership, may exercise the same function.

The strategic interest of the court puts a constant pressure on individual judges, shaping their decisions, sometimes unconsciously. This influence may mitigate the biases each judge harbors in favor of her country, but they may introduce other biases as well. This part focuses on strategic behavior of courts, either to achieve a specific result or to shape their long-term goals and powers. The court's strategic interest doesn't always translate to

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[63] *See* Felix S. Cohen, *Transcendental nonsense and the functional approach*, 35 COLUM. L. REV. 809, 843 (1935).

[64] *See* generally on the way institutional structure affect behavior: JAMES MARCH AND HERBERT SIMON, ORGANIZATIONS (1958) chapter 6.

[65] *See* P. S. ATIYAH & ROBERTS SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW – A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS 288 (1987).

[66] *See* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 39–45 (2015) (expanding on the theoretical analysis of dissents in strategic courts and providing multiple examples of judges who were pressured not to dissent to serve the court's strategic interest).

[67] *See* Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228, 243 (2009) (arguing that Chief Justice Marshall directed the United States Supreme Court to use more unanimous decisions when the status of the court was relatively low); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1314–1319 (2001) (showing how in the first half of the 1920s the United States Supreme Court under Chief Justice Taft suppressed dissents because the court came under heavy criticism. When the criticism subsided, the court became less unanimous. After the court's strategic analysis, pages 1319–1328 present alternative reasons for this phenomenon such as changes in the composition of the court and in Taft's leadership).

matching judicial behavior by every one of the judges. It is entirely possible that judges would put their own interest over that of the court, or even that they would use the delicate position of the court to boost their leverage vis-à-vis other judges. Nevertheless, long-term patterns in the court's behavior would largely conform to the court's strategic goals, as the idiosyncratic behaviors of individual judges balance themselves out.

Another perspective on judicial behavior zooms out even further than the court as a unit. Institutional theories of judicial behavior study the court as an institution embedded in a larger political context.[68] While rational choice institutional theories share the premises of this part and view the court as navigating strategically within a complicated political arena, historical institutional theories view the permutations of the political context over time, and social institutional theories analyze the court in light of general social structures such as class, race, gender, or religion.[69] These institutional theories require a much broader investigation than the one attempted here.

I. Short-Term Strategy of Courts

Short-term strategic models of courts are concerned with what happens after the court issues its judgment: is the judgment complied with? What is the impact of the judgment on society? These models argue that the potential reactions to the court's judgment shape the behavior of the court itself. In other words, the court as a whole changes its behavior in light of the expected responses of other actors.

Models of short-term strategy of national courts can get pretty complicated. They try to think a few steps ahead and see how the interaction of multiple actors would play out and what this means for the actual implications of the court's judgments. For example, a strategic court may decide differently than the combined policy preference of the judges as a group in order not to give a legislative committee an incentive to initiate a legislative process, opening up the possibility for the legislator to set policy far away from the court's preferences.[70] Other actors could be added to this strategic game, each with its own incentives and powers.[71]

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[68] *See* Cornell Clayton & Howard Gillman, *Introduction, in* THE SUPREME COURT IN AMERICAN POLITICS – NEW INSTITUTIONALIST INTERPRETATIONS 1, 2 (Howard Gillman & Cornell Clayton ed., 1999).

[69] *See* Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING – NEW INSTITUTIONALIST APPROACHES 1, 6–7 (Cornell W. Clayton & Howard Gillman ed., 1999).

[70] *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AMER. POL. SCI. REV. 28 (1997).

[71] *See e.g.* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*,

Multiple actors can certainly appear in the international arena as well, but to keep it simple let's imagine that each international court is faced with one state found in violation of international law that can either comply or fail to comply with its judgment. Assuming that the court wants the state to comply, it might offer a compromise solution that is more likely to garner compliance than the sincere preferences of the judges. Even if a majority of ECHR judges, for example, would prefer to grant transsexuals the right to marry partners of their opposite current sex, the judges may suspect that states would fail to comply with such a judgment. Consequently, they may decide to defer to the states and adjust their judgment in such a way that most European states would comply with it.

Clearly, a short-term strategy offers new possibilities of bias. If a certain state is reluctant to comply, it may receive more lenient judgments than more cooperative states, in the hope that it would make some small concessions to the court. Judges may consider that as they vote or write their opinions. They may change the tenor of their conduct as a result.

II. Long-Term Strategy of Courts

Judges internalize the court's concern for compliance with specific cases, but if they do that, why wouldn't they be concerned with the court's long-term ability to garner compliance with all of its judgments? The scholarship in the field has realized long ago that international courts are strategic actors with a particular interest in their ability to ensure their judgments are complied with.[72] Scholars have debated whether judicial independence harms the courts' potential to ensure compliance with demanding judgments,[73] or instead whether a limited amount of independence actually helps the court.[74] The prevailing view seems to be that international courts must take into account a series of political constraints as they set out to make policy.[75] They should also consider other goals besides compliance with their judgments, because the states and organizations that created them assigned them a wider role.[76]

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101 YALE L. J. 331 (1991); Omri Yadlin, *Judicial Activism and Judicial Discretion as a Strategic Game*, 19 BAR ILAN UNI. LAW REV. 665 (2003) (Hebrew).

[72] *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

[73] *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

[74] *See* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

[75] *See* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005).

[76] *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AMER. J. INT'L. L. 225 (2012).

The question is, how should courts do that? How should they set their long-term strategy to achieve their goals? Naturally, there could be many answers to such a broad question, but this paper focuses on one answer on which I elaborated elsewhere at some length.[77]

International courts regularly require states to change their practices in ways that are financially and politically demanding. States comply with such judgments because they calculate that failing to comply would portray them as having a bad reputation for compliance with international law, damaging their relationships with other states. The key for exerting a real influence on states is to increase the potential reputational sanction on states that do not comply. International courts use a series of judicial tactics to build their own reputational capital so that when they order a state to do something, this order will be accompanied with a threat of a serious reputational sanction.

The judicial tactics used by courts are complicated and context-specific. An interesting, perhaps counter-intuitive result, is that courts build their reputation by deliberately issuing demanding judgments and using reasoning techniques that expose their discretion. Compliance with such judgments is harder and more unexpected and that is why when states do comply, they send a potent signal that boosts the court's reputation.

Importantly for the purposes of this paper, international courts are also advised to treat different states differently. States that enjoy a high-reputation for compliance with international law pose a greater threat to the court. Their non-compliance or even their criticism can significantly harm the court's reputation. To counter this threat, international courts treat high-reputation states more leniently than they do low-reputation states. They will reserve their most demanding judgments—especially those that are based on doctrinal novelties—to states that have a low-reputation.

Obviously, this form of behavior is a threat to judicial objectivity. To the extent that individual judges are pressured to serve the court's long-term interest in this way, it may make them far more biased than any personal incentive discussed above. Judges may use ingenious ways to profess evenhandedness even as they pursue the dangerous course that promises their court greater power in the future.

Greater power for the court implies greater power for each of the judges, a fact which may motivate at least some judges to consciously pursue the tactics that are beneficial for the court. Other judges may follow as a result of peer pressure, or simply copy judicial practices of others without deconstructing the motivations behind them. Either way, the

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[77] *See* DOTHAN, *supra* note 66, Shai Dothan, *Judicial Tactics in the European Court of Human Rights,* 12 CHI. J. INT'L. L. 115 (2011).

strategic interest of international courts shapes their judgments and the conduct of judges within them in ways that could bias the court's decision for or against certain states.

F. Conclusion

The reader clearly realized by this point that this paper offers more questions than answers. The power of Judicial Behavior studies—at least for the purpose of this paper—is that it allows scholars of international courts to ask the *right* questions.

The finding that international judges are biased in favor of their home countries is incredibly robust. But to go from that finding to observations about the level of independence of international courts as a whole requires answering a series of complicated queries: are judges attitudinal or strategic? How much can judges influence each other? What is the influence of other actors besides judges on judicial policy? And how do judges internalize the strategic calculations of the court as a whole? To answer these queries, numerous empirical studies can be devised drawing inspiration from generations of scholarly work done mostly on national courts.

Some of these quantitative empirical investigations may seem too complicated, even unfeasible at this point. There may be other ways to go around the problem though, such as conducting serious qualitative work, including interviews with judges that can help uncover their motivations. Another possibility is to attack the problem from a different angle, for example by trying to study the politics of judicial selection in the hope that officials who choose the future international judges know more about their practices than scientific research can currently reveal.[78] Studies of these kinds may actually bring to light the best way to address the problem of national bias: through institutional design directed at improving judicial self-government. A clear example is allowing judges or Presidents of international courts greater influence on the appointment of their future peers. The jury is still out on the question of national bias by international courts, but each new study brings us closer to the truth.

[78] *See e.g* David Kosař, *Selecting Strasburg Judges: A* Critique, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 120 (Michal Bobek ed., 2015); Cosette Creamer & Zuzanna Godzimirska, *The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice*, 30 LEIDEN J. INT'L. L. 947 (2017).